IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78- 78-658

UTAH POWER & LIGHT COMPANY, *Petitioner*

v.

ENVIRONMENTAL DEFENSE FUND, INC.,
DOUGLAS M. COSTLE, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, Utah Power & Light Company, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The Memorandum Opinion and Order of the District Court, dated April 20, 1978, denying Utah Power's motion to intervene is unofficially reported at [1978] 12 Envir. Rep. (BNA) 1001, and is reprinted as Appendix A to this Petition at pages 1a-18a, *infra*. The Order and Memorandum Opinion of the Court of Appeals for the District of Columbia Circuit entered on July 31, 1978, affirming the district court's decision, is unreported and is reprinted as Appendix B to this Petition at pages 19a-22a, *infra*.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, pp. 19a-22a, *infra*) was entered on July 31, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Under Rule 24(a) of the Federal Rules of Civil Procedure and this Court's interpretation of that Rule in *Trbovich* v. *United Mine Workers of America,* 404 U.S. 528 (1972), an applicant for intervention otherwise meeting the requirements of Rule 24(a) is allowed to intervene as of right if representation of that applicant's interest by existing parties "may be" inadequate. In light of this Court's decision in *New Jersey* v. *New York,* 345 U.S. 369 (1953), which imposed a stricter test for determining adequacy of representation *only* for original jurisdiction actions in this Court, the question presented is:

Whether a state's intervention in a lawsuit in federal district court requires that a citizen of that state seeking to intervene as of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure satisfy the more stringent standard which this Court applies in judging adequacy of representation in original jurisdiction actions?

STATUTE INVOLVED

Rule 24(a) of the Federal Rules of Civil Procedure, 28 U.S.C., provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

On August 22, 1977, plaintiff Environmental Defense Fund, Inc., commenced this action in the United States District Court for the District of Columbia for declaratory, injunctive and mandatory relief. The named defendants include the Administrator of the Environmental Protection Agency, the Secretary of Interior and the Commissioner of the Bureau of Reclamation. Plaintiff seeks in this action: (a) to set aside the Environmental Protection Agency's (EPA) approval of state-promulgated water quality standards and implementation plans governing salinity pollution in the Colorado River Basin; (b) to require EPA to promulgate effective water quality standards and implementation plans for salinity; and (c) to require defendants to implement necessary salinity control measures.

Jurisdiction in the district court was sought under 28 U.S.C. § 1331 (Federal Question); 33 U.S.C. § 1365 (Citizens suits under the Federal Water Pollution Control Act of 1972); 28 U.S.C. § 1361 (Mandamus); 28 U.S.C. § 1337 (Commerce regulation); and 42 U.S.C. § 4321 *et seq.* (The National Environmental Policy Act of 1969).

On January 19, 1978, the district court granted the motions to intervene of the seven Colorado River Basin

states: Nevada, California, Utah, Colorado, Wyoming, New Mexico and Arizona. Each of these states had sought leave to intervene as defendants in order to protect various proprietary, sovereign and economic interests at stake in this litigation.

Each of the states through which the Colorado River runs has a primary proprietary interest in the waters of that River. The Upper Basin states are entitled to certain quantities of water from the River according to two interstate compacts: the Colorado River Compact, approved in the Boulder Canyon Project Act of 1928, 43 U.S.C. § 617, and the Upper Colorado River Basin Compact, approved in Act of April 6, 1946, 63 Stat. 31. The Lower Basin states are entitled to apportioned shares in accordance with the Boulder Canyon Project Act, 43 U.S.C. § 617. *See Arizona* v. *California,* 373 U.S. 546 (1963).

These apportioned waters are property of the seven states who thus are responsible for allocating shares to various users within their respective jurisdictions. Among those users to whom water is allocated is the state itself for use in state-run recreation areas, fisheries and other concerns. As water users themselves, these states—all of which apply the doctrine of prior appropriation—compete with other users. It was in part to protect this proprietary interest from possible infringement that the various basin states sought, and were granted, intervention.

In addition to their proprietary interests, each state through which the Colorado River runs possesses a sovereign interest in those waters. These states have adopted various water quality standards embodied in water pollution control statutes and regulations. They have also adopted implementation plans for salinity

control. These plans and standards are the subject in controversy in this action and were promulgated by the states for the protection of their citizens. The states' interest in defending their plans and standards from direct attack by the plaintiff was another factor in their obtaining leave to intervene.

Furthermore, these states also have substantial economic interests in the development of the Colorado River. These states have pursued a course of development consistent with the water quality standards currently in force. They have begun beneficial projects in reliance on the current standards. These projects are of immense economic value to the states, and therefore the states' desire to protect them and assure the orderly growth and development of the areas served by the Colorado River presented a final ground for intervention.

On April 20, 1978, the district court denied the timely motions for leave to intervene as party defendants of several non-state parties, including Utah Power & Light Company.[1] Utah Power is the principal electric public utility in Utah, providing power throughout 79,000 square miles of Utah, Idaho and Wyoming. The company serves more than 400,000 residential, commercial, industrial and municipal consumers.

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[1] The other parties seeking intervention consisted of a group of seven public entities from the state of Colorado (viz., the Colorado River Water Conservation District; the Southwestern Water Conservation District; the Northern Colorado Water Conservancy District; the City of Colorado Springs, Colorado; City of Aurora, Colorado, Board of Water Works of the City of Pueblo, Colorado, and the City and County of Denver), the Metropolitan Water District of Southern California, and finally, a group of four diverse entities from several Basin states (the Mountain States Legal Foundation, the National Water Resources Association, the Colorado Water Congress and the Yuma Auxiliary Project).

Water from the Colorado River basin is and will continue to be absolutely essential to the present and future operation of Utah Power's steam-electric generating units in the states of Wyoming and Utah. At the present time, the company has the right to withdraw 81,895 acre feet of water per year from the Colorado River drainage for use in Wyoming, and approximately 50,000 acre feet for use at three of its Utah plants. In addition, the company has applications pending for the withdrawal of an additional 1,895,440 acre feet per year, and it has also petitioned the Central Utah Water Conservancy District for an allocation of 40,000 acre feet of water representing a portion of the water needed for a proposed 3,000 megawatt power plant. Further, the company has applied for an additional 55,000 acre feet per year for potential nuclear plant usage. Finally, the company has certificated water storage rights of 87,895 acre feet, and has applied for an additional 330,000 acre feet annually for storage.

Utah Power's dependence upon the Colorado River and its tributaries is not limited to its need to withdraw water for the operation of its electric power plants. The company must also discharge materials from certain of its plants in Wyoming and Utah into receiving waters which are tributary to the Colorado River. At the present time the company is the holder of two permits from the United States Environmental Protection Agency authorizing the discharge of water in accordance with specific effluent limitations.

These water withdrawal rights and discharge permits are cornerstones of Utah Power's economic survival. Some of these rights and permits, however, are subject to modification and could be altered if the new

"conditions" sought by the plaintiff are ordered by the district court.

The district court recognized that Utah Power had a distinct concern over the remedies sought by the plaintiff by expressly finding that the company satisfied two of three requirements for intervention as of right.[2] The court first found that:

> [I]t is undisputed that all of the proposed intervenors in this case have at least a minimal interest in the regulations governing the salinity levels in the Colorado River since they all depend on the River, to one extent or another, for water or economic use.

Appendix A, p. 3a. Later, the court described the various water use and discharge permits and water storage licenses which Utah Power owns, concluding that "U.P.&L. has an interest in this matter." Appendix A, p. 11a.

With respect to the impairment requirement, the district court again held that Utah Power satisfied the statutory requirements. "[I]t appears that, in a general sense, denial of this motion [to intervene] may impair U.P.&L.'s ability to protect that interest." Appendix A, p. 11a. Additionally, the court noted that:

> [I]t seems sufficient, as far as the impairment of interest requirement, that there is a possibility that if this court invalidates these regulations the

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[2] Rule 24(a) of the Federal Rules of Civil Procedure provide that intervention as of right is allowed when, (1) the applicant claims an interest relating to the property or transaction which is the subject of the action and, (2) he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, (3) unless the applicant's interest is adequately represented by existing parties.

> ensuing rulemaking may result in a curtailment of U.P.&L.'s water use and storage rights.

Appendix A, p. 12a.

However, finding that Utah Power's interest in this litigation was adequately represented by Utah and Wyoming, Appendix A, p. 12a, and completely ignoring a memorandum from the state of Wyoming, Appendix C, which represented that that state could not adequately represent Utah Power's interest, the court denied Utah Power's motion for leave to intervene.

Utah Power, the Metropolitan Water District of Southern California, and the group of Colorado state and public entities all appealed the decision and moved for summary reversal of the order. The federal defendants and the plaintiffs moved for summary affirmance. On July 31, 1978, the United States Court of Appeals for the District of Columbia Circuit affirmed the district court.

A two judge panel, consisting of Chief Judge Wright and Circuit Judge McGowan, issued a per curiam memorandum relying solely on this Court's decision in *New Jersey* v. *New York,* 345 U.S. 369 (1953), as the basis for its decision. The court did not disturb the district court's findings of Utah Power's interest in this litigation or the possible impairment of that interest. Rather, the court held that the doctrine of *parens patriae,* as explained by this Court in *New Jersey* v. *New York,* precluded Utah Power's intervention since all of the Colorado River Basin states had been allowed to intervene in the case. The court further held that:

> [w]hen the views of appellants are identical to those of their states, there is no need for intervention; when the views of appellants differ from those of their states, those differences are to be resolved through the internal mechanisms, such as the political processes, of the sovereign states rather than by the federal courts.

Appendix B, p. 21a.

The case in the district court is still in its pretrial stages. The district court has denied motions by the defendants for a change of venue and for judgment on the pleadings. Discovery is still being undertaken by the plaintiff and various intervenor defendants. A status call is scheduled for December 8, 1978, by which time discovery is scheduled to have been completed.

REASONS FOR GRANTING THE WRIT

The Court of Appeals based its holding exclusively on this Court's decision in *New Jersey* v. *New York,* 345 U.S. 369 (1953). Completely discounting the original jurisdiction context of that case, Appendix B, p. 21a, n. 2, the court held that:

> [U]nder the *parens patriae* principle set forth in that case, intervention as of right *must be denied.*

Appendix B, p. 20a-21a (footnote omitted) (emphasis supplied). It was the court's misunderstanding and misapplication of *New Jersey* v. *New York* which led it to summarily affirm the district court's denial of intervention to Utah Power and which requires review by this Court.

I.

New Jersey v. *New York* was a case involving the original jurisdiction of this Court. In that action, this

Court denied the city of Philadelphia leave to intervene in an original suit by the state of New Jersey against the state of New York and New York City for injunctive relief against diversion of waters of the Delaware River. Since the state of Pennsylvania had been allowed to intervene and strongly opposed Philadelphia's intervention request, 345 U.S. at 372,[3] this Court required Philadelphia to satisfy a more stringent standard than is normally required for determining a prospective intervenor's adequacy of representation by existing parties in cases in the district court. 345 U.S. at 373.

The opinion in *New Jersey* unambiguously indicates that the original jurisdiction setting was the determinative factor in imposing the stricter standard.[4] What the Court of Appeals quotes as the "doctrine" of *New Jersey* is a doctrine of original jurisdiction, as this Court's opinion made clear:

> *Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions.* An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.

345 U.S. at 373 (emphasis supplied).

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[3] The state of Wyoming strongly supported Utah Power's intervention motion, *see* Appendix C, and none of the other states opposed that motion.

[4] Every case which this Court cited in *New Jersey* v. *New York* was a case involving this Court's original jurisdiction. Subsequently, every opinion of this Court citing *New Jersey* has been in a case involving original jurisdiction.

This Court has consistently stated that its procedure in original jurisdiction actions is different from the procedure of the district courts. *Ohio* v. *Kentucky,* 410 U.S. 641 (1973); *Rhode Island* v. *Massachusetts,* 14 Pet. 210 (1840). Because of this Court's desire to have its original jurisdiction invoked sparingly, it has frequently departed from the federal rules in original actions to limit its jurisdiction. *See e.g., Ohio* v. *Kentucky,* 410 U.S. 641 (1973); *Utah* v. *United States,* 394 U.S. 89 (1969).

Intervention necessarily expands the dimensions of an action, and thus it is especially appropriate for this Court to disregard the federal intervention rules when exercising its original jurisdiction. The Court in *New Jersey* expressly characterized its denial of intervention as an attempt to limit the dimensions of the original action before it. 345 U.S. at 373. This Court has recently confirmed that the *New Jersey* limitation on intervention applies *only* to original actions:

> We need not employ our original jurisdiction to settle competing claims to water within a single State. This is particularly the case where the individual users of water in the Newlands Project, *who ordinarily would have no right to intervene in an original action in this Court, New Jersey* v. *New York,* 345 U.S. 369, 373-375, 73 S.Ct. 689, 97 L.Ed. 1081 (1953), *would have an opportunity to participate in their own behalf if this litigation goes forward in the District Court.*

United States v. *Nevada and California,* 412 U.S. 534, 538 (1973) (memorandum decision) (emphasis supplied). *Cf. Illinois* v. *City of Milwaukee, Wisconsin,* 406 U.S. 91 (1972).

This Court could not have made the scope of the *New Jersey* v. *New York* rule clearer. Only in original actions in this Court is the stricter standard of *New Jersey* to be employed.[5] In all district court cases, the Federal Rules of Civil Procedure, as interpreted by this Court, are to govern. This confirmation of the limited applicability of the *New Jersey* v. *New York* doctrine demonstrates the extent of the Court of Appeals' misunderstanding and misapplication of that doctrine. To assure proper interpretation of the *New Jersey* v. *New York* rule, this Court should review the Court of Appeals' decision.

The Court of Appeals' use of the *parens patriae* doctrine, even apart from its formulation in *New Jersey* v. *New York,* as a limitation on intervention is also a departure from precedents of this Court. In *Hawaii* v. *Standard Oil Co. of California,* 405 U.S. 251 (1972), this Court traced the development of that doctrine in federal litigation, demonstrating that it is a mechanism which allows a state to sue on behalf of its citizens "to prevent or repair harm to its 'quasi-sovereign' interests." 405 U.S. at 258. The Court also noted that *parens patriae* actions which this Court has considered "deal primarily with original suits brought directly in this Court." *Id.* The *parens patriae* principle is thus not a device for excluding private parties from litigation, as the Court of Appeals held, but rather one which allows a state to become a party to a litigation.

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[5] *See Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 U.S. 137 (1967) where this Court ordered that both the state of California and Southern California Edison, a public utility within the state, be allowed to intervene in an antitrust suit in the district court pursuant to the predecessor of Rule 24. The Court did not mention *New Jersey* v. *New York.*

In *United States* v. *Nevada and California,* 412 U.S. 534 (1973), this Court again discussed the affirmative application of the *parens patriae* principle in an original jurisdiction context. The Court stated, in dicta, that in disputes between states over the allocation of water from an interstate stream, a state would have the "right, *parens patriae,* to represent all the nonfederal users in its own state insofar as the share allocated to the other state is concerned." 412 U.S. at 539.[6] *Parens patriae* was used again simply as a device to enable a state to participate where it might not otherwise be able to do so. The Court of Appeals' unprecedented expansion of this doctrine to prevent private parties from defending their own interests in suits brought in federal district courts merits review by the Court.

II.

By incorporating the "compelling interest" standard of original jurisdiction cases into intervention determinations in the district court, the Court of Appeals has distorted Rule 24(a) of the Federal Rules of Civil Procedure. Under that court's unprecedented interpretation of that Rule, a citizen seeking to intervene in a lawsuit in which his state is also a participant can satisfy the "compelling interest" standard only by demonstrating that during the course of the deliberation on the merits, the court will be required to reject

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[6] The Court did not address the issue of whether the state would have a similar right where there was no dispute between states but there was an attack on state-promulgated regulations in defense of which the states are jointly united. Neither did the Court address the question of whether the state's participation in the suit, *parens patriae,* barred citizens of that state from also participating. However, both issues are raised in the instant case.

an argument or claim advanced by the state because it was a claim or argument personal to the absentee intervenor. Appendix B, p. 22a n.3. This Court should review the Court of Appeals' decision in order to rectify this perversion of Rule 24(a).

The practical effect of the lower court's holding is the formulation of a *per se* rule of exclusion in which the state's participation in a lawsuit precludes any citizen of that state from intervening therein.[7] It does not matter that the interests of the state and prospective intervenor are distinct and potentially conflicting.

> When the views of appellants are identical to those of their states, there is no need for intervention; when the views of appellants differ from those of their states, those differences are to be resolved through the internal mechanisms, such as the political processes, of the sovereign states rather than by the federal courts.

Appendix B, p. 21a.

According to the lower court, a state's claim that it may not be able to adequately represent the citizen's interests is equally irrelevant.

> The states may not readily relinquish their sovereign function of resolving differences (if any) among their political subdivisions' and citizens' views on water plans and rights as they relate to this case once they have intervened to represent those subdivisions and citizens.

Id.

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[7] One wonders if a prospective intervenor can *ever* demonstrate that a district court will have to *reject* a claim submitted by the state because it was personal to the absentee party.

The impropriety and harsh consequences of this rule are highlighted by the facts of this case. The state of Wyoming expressly declared that it could not adequately represent Utah Power's interest in this litigation, Appendix C. Wyoming also admitted that it had interests that could conflict with those of Utah Power, *Id.* Utah, the other state charged by the lower courts with representing Utah Power's interests, is participating in this lawsuit to protect three distinct interests, none of which is completely shared by Utah Power. According to the Court of Appeals, Utah Power must seek a "political" solution to protect its property interests.[8] It cannot seek judicial protection of its property in this case—a result which is constitutionally suspect.

The Court of Appeals' decision is contrary to the provisions of Rule 24(a) of the Federal Rules of Civil Procedure. This rule provides that one who meets the other requirements "shall be permitted to intervene . . . unless the applicant's interest is adequately represented by existing parties."[9] An applicant's interests can never be "adequately represented" by a party that has interests adverse to those of the applicant. *See e.g., Stadin* v. *Union Elec. Co.,* 309 F.2d 912 (8th Cir. 1962), *cert. denied,* 373 U.S. 915 (1963); *see also New Mexico* v. *Aamodt,* 537 F.2d 1102 (10th Cir. 1976), *cert. den.,* 429 U.S. 1121 (1977); *Johnson* v. *San Francisco Unified School Dist.,* 500 F.2d 349 (9th Cir. 1974).

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[8] The court below gave no hint as to the nature of the "political" remedies available to a party who has been denied intervention.

[9] The district court found that Utah Power met the other requirements of Rule 24(a) and the Court of Appeals did not disturb this finding. *See* p. 8 *supra.*

The various states who are allegedly representing Utah Power in this litigation possess interests adverse to those of the company and thus cannot represent its interests. The states are regulators; Utah Power is a regulated user. *See New York P.I.R.G.* v. *Regents of the University of the State of New York,* 516 F.2d 350 (2d Cir. 1975). The states and Utah Power are competing users of water. *See New Mexico* v. *Aamodt,* 537 F.2d 1102 (10th Cir. 1976) *cert. den.* 429 U.S. 1121 (1977). The states have the power to allocate water to other municipal and private users to the exclusion of Utah Power. Utah Code Ann. §§ 73-1-1, 73-3-1. The manner in which the states protect their interests as users, regulators and allocators will thus not always be to Utah Power's benefit, and quite possibly could impair its interests.

The Court of Appeals' newly formulated standard for Rule 24(a) intervention conflicts with this Court's decision in *Trbovich* v. *United Mine Workers of America,* 404 U.S. 528 (1972). There, this Court ruled that Rule 24(a) requires only that the applicant show that representation of his interest *may be* inadequate, and that the burden of making this showing should be treated as minimal. This Court ordered that the applicant be allowed to intervene because there was "sufficient doubt about the adequacy of representation to warrant intervention." *Id.* at 538.

In this action, there is more than "sufficient doubt" about the states' ability to represent Utah Power. Wyoming has conceded that it cannot represent Utah Power's interest, Appendix C. Moreover, the states intervened to protect their regulations from plaintiff's challenge. Thus, the states' primary interest in this action is that of a *regulator.* Utah Power's interest,

however, is that of a *regulated user* of water. The interests of the regulator and the regulated user are different and potentially conflicting. *See New York P.I.R.G.* v. *Regents of the University of State of New York,* 516 F.2d 350 (2nd Cir. 1975). The state is the owner of all of the Colorado River water within its boundaries. Utah Code Ann. § 73-1-1. It also has the power to allocate that water to various users, including Utah Power, but even more importantly, to itself. The interests of competing users of this water are conflicting. Thus, *Trbovich* requires that intervention be permitted.

In *Trbovich,* this Court, reversing the District of Columbia Circuit, ruled that although the Secretary of Labor was charged by statute with representing the interests of the applicant, intervention was still warranted because the Secretary also had a duty to serve another distinct interest, the public interest. The Court recognized that "[b]oth functions are important, and they may not always dictate precisely the same approach to the conduct of the litigation." *Id.* at 539.

The states in this action, like the Secretary in *Trbovich,* have a duty as regulators of the states' water resources to protect sovereign interests which are distinct from the purely proprietary interests of Utah Power. Furthermore, the states have their own proprietary interests in this litigation which, in fact, are in conflict with those of Utah Power. Should the state decide in the course of this litigation that its sovereign, economic, or indeed its own proprietary interests are more important than Utah Power's proprietary interest, then Utah Power's views will not be represented in the litigation. *See New Mexico* v. *Aamodt,* 537 F.2d 1102 (10th Cir. 1976) *cert. den.* 429 U.S. 1121 (1977).

The Court of Appeals would have these differences resolved through the "political processes." Rule 24(a) and *Trbovich* are clear and to the contrary; the applicant must be permitted to intervene and speak for itself.

The Court of Appeals for the District of Columbia Circuit has adopted the *Trbovich* standard. *See Hodgson* v. *United Mine Workers,* 473 F.2d 118 (D.C. Cir. 1972); *Natural Resources Defense Council* v. *Costle,* 561 F.2d 904 (D.C. Cir. 1977). It has also recognized that cases arising before the 1966 amendments to Rule 24 concerning the adequacy of representation standard are of little value in construing the amended Rule. *Nuesse* v. *Camp,* 385 F.2d 694 (D.C. Cir. 1967). Yet, the court felt so constrained by this Court's pre-amendment *New Jersey* v. *New York* decision that it ignored both its own admonition in *Nuesse* v. *Camp* that such cases were of "little guidance," and its post-amendment adoption of *Trbovich*. This Court should review the Court of Appeals' decision in order to assure consistent application of Supreme Court precedent in the District of Columbia Circuit.

The precedential impact of this decision undermines both Rule 24(a) and this Court's decision in *Trbovich*. It will operate to preclude intervention by private parties in actions concerning dual regulation by the states and federal government. Under the rule established by the Court of Appeals, the necessary participation by the states would prevent participation by other parties. Under this rule, the courts will determine important issues concerning the validity of federal and state regulations without the views of those persons who are directly affected—the regulated

CONCLUSION

The Court of Appeals has established unprecedented standards for determining a prospective intervenor's adequacy of representation when a state has intervened in federal district court litigation. It has engrafted this Court's intervention standards in original jurisdiction cases onto the routine intervention determinations in district court cases. It has misapplied this Court's *New Jersey* v. *New York* rule and its formulation of the doctrine of *parens patriae*. It has both amended Rule 24(a) of the Federal Rules of Civil Procedure and ignored this Court's decision in *Trbovich* v. *United Mine Workers*. In order to reestablish the limitations of *New Jersey,* to conclusively reaffirm the principles of *Trbovich* and *parens patriae,* and to authoritatively interpret Rule 24(a), this Court should issue a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ENVIRONMENTAL DEFENSE FUND, INC., *Plaintiff*,

v.

DOUGLAS M. COSTLE, ET AL., *Defendants*.

Civil Action No. 77-1436

Filed April 20, 1978

MEMORANDUM OPINION AND ORDER

This matter comes before the court on motions to intervene filed by a variety of private and public entities. The case in chief involves a dispute regarding the salinity level in the waters of the Colorado River. Pursuant to 33 U.S.C. §§ 1311-1313, the seven states of the Colorado River Basin, after several years of interstate negotiations, adopted salinity control standards for the River. In 1976, the Environmental Protection Agent (EPA) approved the salinity standards agreed to by the states. As yet, no general water quality standards have been devised by the states. Plaintiff Environmental Defense Fund (EDF) has filed a complaint containing six claims regarding this situation. First EDF contends that the salinity standards promulgated by the states and adopted by EPA fail to meet the requirements of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.*, and that the Director of EPA acted contrary to his mandatory duties in approving the plan. Second, EDF asks that the federal defendants be compelled to promulgate acceptable salinity standards. Third, EDF asks that EPA take over the states' task of identifying point sources where salinity standards are not being met and to

establish daily maximum load levels. Fourth, EDF asks that the planning process assigned to the states under section 1313 be closely monitored by EPA. Fifth EDF seeks to compel the Department of the Interior to implement the water quality policies promulgated by the Basin states in their 1972 Conference and adopted by the Colorado River Salinity Control Act of 1974, 88 Stat. 270. Sixth, EDF seeks to compel the federal defendants to seek alternate ways in which to deal with the salinity problem. In light of the broad nature of the participation of the Colorado River Basin states in the promulgation of the regulations at issue in this case, this court allowed the seven Basin states to intervene as defendants in this matter on January 19, 1978.

It is against this background that the present motions to intervene must be judged. Four motions to intervene are currently pending before this court. The first motion was filed by a group of state and municipal public entities from the state of Colorado. For the purposes of convenience, these entities shall be referred to as Intervention Group I. The second motion was filed by the Metropolitan Water District of Southern California. The third motion was filed by the Utah Power and Light Co., a utilities company. The fourth motion was filed by a group of organizations representing a variety of interests in the Basin area, and shall be referred to as Intervention Group II. Although there is some overlapping of the issues presented by each of these motions, each motion shall be analyzed separately so that any distinct interests represented by the intervenors will be accorded full consideration.

Each of these entities seeks intervention as of right, or in the alternative permissive intervention. The request for intervention as of right shall be discussed first.

I. Intervention as of Right.

Intervention as of right is governed by Federal Rule of Civil Procedure 24(a), and particularly in this case by subdivision (a)(2), which states:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

It is undisputed that all of the proposed intervenors in this case have at least a minimal interest in the regulations governing the salinity levels in the Colorado River since they all depend on the River, to one extent or another, for water or economic use. Therefore, the issues before the court are whether the proposed intervenors' interests will be practically impaired by the disposition of this case, and whether the present parties adequately represent the proposed intervenors' interests.

A. *Intervention Group I.*

As indicated earlier, the seven entities in this group are all state or municipal public entities from the state of Colorado. The Colorado River Water Conservation District is an agency of the state of Colorado charged with preserving the waters allocated to Colorado pursuant to the interstate Colorado River Compact. It is the principle water policy agent of the state regarding the headwaters of the Colorado River. The second member of this group is the Southwestern Water Conservation District, which is another state agency which is charged with oversight of the tributaries of the Colorado River in the southern part of the state. The third member is the Northern Colorado Water Conservancy District, a state agency which contracts with the U.S. Bureau of Reclamation for the repayment of facilities constructed by the U.S. in the Colorado-Big Thompson Federal Reclamation Project. The fourth member is the city of Colorado Springs, Colorado. The fifth member is the city of

Aurora, Colorado. The sixth member is the Board of Water Works of the City of Pueblo, Colorado. The seventh member is the city and county of Denver, which appears through its Water Commission. The first three members are all state agencies which deal with water supply in one form or another. The last four are municipal corporations or the agencies thereof which seek to secure the water supplies for their populations.

1. *Practical Impairment of Interest.* The entities in Group I indicate that they feel that in light of their dependence on the Colorado River as a source of water and of income, denial of their motion to intervene in this suit will practically impair or impede their efforts to protect their rights to use of the River. The plaintiff and the Federal defendants dispute their contentions. They point out that if this court were to invalidate these regulations, then EPA would have to engage in rulemaking, during which the proposed intervenors could once again act to protect their positions. Further, the plaintiff and the federal defendants state that this case will have no stare decisis effect on the proposed intervenors in the context of this dispute. The plaintiff and the federal defendants view this case as only a possible first step in a process. If the regulations are upheld, the proposed intervenors retain their present water rights. If the regulations are overturned, the proposed intervenors suffer no immediate deprivation since the entire rulemaking process must begin over again.

Despite the apparent logic in the position advanced by the plaintiff and the federal defendants in regard to this requirement for intervention as of right, their position does not appear to comport with the law. In *Natural Resources Defense Council v. Costle,* 561 F.2d 904 (D.C. Cir. 1977), the court stated that, "[I]t is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation." Id. at 910. The *N.R.D.C.* case involved a situation in which

this district court was closely involved in monitoring the implementation of a settlement agreement. The court's role in the present case is much more limited, and to that extent the *N.R.D.C.* suit is distinguishable. However, the circuit court indicated that factors of convenience are especially relevant in cases of administrative review. *Id.* Since this case would seem to fall into that mold and assuming *arguendo* that the proposed intervenors have an interest distinct from those already represented in this case, intervention should not be denied solely on the grounds that those interests would not be impaired by an adverse disposition of this suit.

2. *Adequacy of Representation.* The more crucial question in this context therefore becomes whether the entities already in this suit will adequately represent the interests advanced by the proposed intervenors. The determination of this issue is complicated in this case by the presence of the seven Basin states as intervenor/defendants. As such, this court must determine whether the EDF, the federal defendants and, in this case, the state of Colorado adequately represent the interests advanced by the entities in Group I.

In order to shoulder the burden of proving inadequacy of representation under Rule 24(a)(2), the proposed intervenors need only show that the representation of their interests by the other parties may be inadequate and this burden is a minimal one. *Tbrovich v. United Mine Workers of America,* 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 636 n.10 (1972). The proposed intervenors contend that their interests, although not necessarily antagonistic to those of the state of Colorado, are sufficiently different and particularized to warrant a finding of inadequacy of representation. The plaintiff and the federal defendants argue that since the proposed intervenors in Group I are all state or municipal subdivisions of the state of Colorado, then the presence of the state in this case indicates that the interests of the proposed intervenors are adequately represented.

In asserting their case in support of intervention, the proposed intervenors place primary reliance on three cases: *N.R.D.C. v. Costle, supra; United States v. Reserve Mining Co.*, 56 F.R.D. 408 (D. Minn. 1972); and *New York P.I.R.G., Inc. v. Regents of Univ. of State of New York*, 516 F.2d 350 (2d Cir. 1975) [hereinafter cited as *P.I.R.G. v. Regents*]. However, all three of these cases are fundamentally inapplicable to the case at hand.

In *N.R.D.C. v. Costle, supra*, the government and several industrial groups had entered a settlement agreement whereby the EPA would promulgate certain sets of regulations pursuant to the Federal Water Pollution Control Act, *supra*. Only the participants in the settlement agreement would have input into the rulemaking proceedings and in the implementation and oversight proceedings in the district court. This court denied intervention to several other industrial groups on the theory that the EPA would adequately represent the interest that all regulations should be lawful, and the other industrial participants would assure that industries' point of view was presented. The circuit court reversed, stating that the additional industrial group had an interest in the actual content of the regulations, not just in their legality. Furthermore, the circuit court indicated that since a variety of effluents were to be regulated, the various producers of these effluents should be heard. 561 F.2d at 912. In the present case, the court is not so intimately involved. This court's task is simply to rule on the validity of regulations already promulgated. If those regulations are found wanting, the statute provides that EPA, not this court, shall engage in *de novo* rulemaking. Furthermore, no action by this court in this case will limit the access of any of these proposed intervenors to any further rulemaking.

Whereas a settlement agreement expanded the court's function in the *N.R.D.C.* case, the court in *United States v. Reserve Mining Co.*, found its role expanded by statute.

Because the suit in that case was an abatement action brought by the United States to end the depositing of taconite into Lake Superior, the court determined that the Federal Water Pollution Control Act, 33 U.S.C. § 1160 (c)(5), required it to weigh a variety of interests in determining whether the regulation had been violated and if compliance was feasible. 56 F.R.D. at 413. The court indicated that:

> The role of a court in such a situation, because of the nature of the proceedings and considerations which must be reviewed and undertaken pursuant to the statute, transcends ordinary civil litigation and makes a reviewing court more of an administrative tribunal than a court in an ordinary adversary civil case.

Id. The court noted that in such an atypical civil litigation, the interest requirement in an environmental matter should be inclusive, not exclusive. *Id.* In view of this expanded role, the court in *Reserve Mining* allowed wide intervention. Specifically important is the view of the proposed intervenors in this case is the fact that the court allowed several towns, villages and counties of the state of Minnesota to intervene. The court noted explicitly that the state of Minnesota itself was not a party to this proceeding, although it was Minnesota's regulation that was at issue. The court further noted that if Minnesota had intervened, allowing the local entities to intervene in this matter would create the conceptual problem of allowing the local entities to oppose state environmental policy which they would normally be without power to contravene. *Id.* at 415-16. However, the court noted that under the circumstances it would treat the local entities as the court's advisors regarding the economic impact of any proposed regulation. *Id.* at 416. It is clear that the present case is much more in the nature of ordinary civil litigation. This is not an abatement action, and the court may not engage in any weighing of interests. This court is interested in the contents of the regulations at issue in

this case only insofar as they indicate whether the Secretary has met his statutory duty in approving their adoption. The court in *Reserve Mining* took great pains to indicate the exceptional nature of the case before it as a means of justifying its wide-ranging grant of intervention. Absent such extreme circumstances, this court must be more circumspect in allowing intervention.

The final case upon which the proposed intervenors in Group I principally rely is *P.I.R.G. v. Regents, supra.* In that case, a public interest group attacked a New York State regulation governing pricing policies in pharmacies. An association of pharmacists sought to intervene so as to represent their economic interests in the matter. The court held that while the question of adequacy of representation was a close one, there was a substantial likelihood that the pharmacists would represent their own economic interests more vigorously than would the state, especially in light of the state's admission that its interests might be adverse to those of the pharmacists. 516 F.2d at 352. It should be noted that the entities in Group I are not private groups seeking to maximize profits, but they are all public entities which, in one way or another, are bound closely by state regulation. It is this nature of the governmental relationship between the state of Colorado and the proposed intervenors in Group I which forms the crux of the argument advanced by the parties opposing the intervention motion.

In opposing the motion of Group I for intervention, the plaintiff and the federal defendants urge this court to accept the doctrine of *parens patriae* as presented by the Supreme Court in *State of New Jersey v. State of New York,* 345 U.S. 369, 73 S.Ct. 689 (1953). In that case, the state of New York, upon petition of New York City, planned to divert the waters of the Delaware River for drinking water purposes. The state of New Jersey brought an original action in the Supreme Court to enjoin the diversion, and forcibly joined New York City as an indispensible party

defendant. The state of Pennsylvania was also allowed to intervene as a user of the Delaware River waters, and the case proceeded to judgment before a special master who devised a plan for the use of the waters. Some years later, the city of New York petitioned to reopen the case so as to modify the plan and increase its share of the water supply. Upon reopening, the City of Philadelphia petitioned to intervene on the grounds that it too relied on the river for water. In rejecting the petition to intervene, the Supreme Court relied on the doctrine of *parens patriae:*

> The "parens patriae" doctrine . . . is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, "must be deemed to represent all its citizens." Com. of Kentucky v. State of Indiana, 1930, 281 U.S. 163, 173-174, 50 S.Ct. 274, 277, 74 L. Ed. 784. The principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

Id. at 372-373, 73 S.Ct. at 691. After cataloging the problems which would ensue if the Court became involved in "an intramural dispute over the distribution of water within the Commonwealth," *id.* at 373, 73 S.Ct. at 691, the Court stated:

> An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.

Id.

Although the Supreme Court made this analysis of the *parens patriae* doctrine within the context of its original jurisdiction, the doctrine is not limited to that situation. The Third Circuit advanced a similar analysis in *Commonwealth of Pennsylvania v. Rizzo*, 530 F.2d 501 (3d Cir. 1976), and stated:

> [A] presumption of adequate representation generally arises when the representative [of a proposed intervenor's interest] is a governmental body or officer charged by law with representing the interests of the absentee. . . . Where official policies or practices are challenged, it seems unlikely that anyone could be better situated to defend than the governmental department involved and its officers.

Id. at 505. All of the entities in Group I are state agencies or offices, or municipalities within the state of Colorado. None have offered any compelling reason or circumstance in which they validly differ with the position taken by the state of Colorado. The formulation of these salinity control standards were expressly left to the states of the Colorado River Basin. The various public subdivisions which here seek to intervene do not allege that the states or the federal government acted illegally in promulgating these regulations. The issues of the allocation of the water levels approved, or the implementation of these regulations are not before this court. As such, the interests advanced by these proposed intervenors in upholding the validity of these previously promulgated regulations would appear to be identical with those interests advanced by the states. Since the states adequately represent the interests of these entities, intervention as of right is denied.

B. *Metropolitan Water District of Southern California*

The second motion to intervene was filed by the Metropolitan Water District of Southern California. By its own admission, this proposed intervenor is a public corporation

created by the Metropolitan Water District Act of California, with its primary functions being to develop, store and deliver water to approximately 27 other public agencies, which in turn distribute the water to approximately half of the population of the state. The reasons in support of this motion are similar to those advanced by the entities in Group I, *supra*. Since the Metropolitan Water District is a creature of the state of California, and since the state of California has already intervened in this action, the Metropolitan Water District's motion to intervene as of right is denied for the same reasons as were advanced regarding Group I, *supra*.

C. *Utah Power and Light Co.*

Utah Power and Light Co. (hereinafter U.P.&L.), a utility company which supplies a large portion of the total electricity used in the states of Utah and Wyoming, filed the third motion to intervene. U.P.&L. holds several water use permits and water storage licenses in connection with its hydroelectric generating plant on the Colorado River. U.P.&L. indicates that if it is not permitted to intervene, it will be unable to protect its interests in these permits and licenses.

Granting that U.P.&L. has an interest in this matter, it appears that, in a general sense, denial of this motion may impair U.P.&L.'s ability to protect that interest. This suit is not simply seeking a review of administrative action. It is a citizen's suit brought pursuant to 33 U.S.C. § 1365(a) to compel the Administrator to do some nondiscretionary act. Such a suit may be brought by "any citizen", and section 1365(g) defines the term "citizen" as "a person or persons having an interest which is or may be adversely affected." Although the right to intervene in an enforcement action has been limited, 33 U.S.C. § 1365(b), *see Stream Pollution Control Bd. of Indiana v. U.S. Steel Corp.*, 512 F.2d 1036, 1041 (7th Cir. 1975), no limitation has been

created for citizen suits. Therefore, it seems sufficient, as far as the impairment of interest requirement, that there is a possibility that if this court invalidates these regulations, the ensuing rulemaking may result in a curtailment of U.P.&L.'s water use and storage rights.

The court must, therefore, determine once again whether the parties already present in this suit adequately represent the interests of the moving entity. The states of Utah and Wyoming represented to the court in their motions to intervene that they could protect the interests shared by their citizenries in water quality control, water resource planning and allocation, and the various forms of economic development dependent on the river. U.P.&L. admits that it does not disagree with the positions taken by any of the other defendants in this matter, but rather states that inadequacy of representation results since its interest is more specific than those represented by the states and federal defendants.

Although the standard for determining inadequacy of representation is lenient, the moving party still bears the burden of showing that representation may be inadequate. *Trbovich v. United Mine Workers, supra.* Also, though it is true that in some cases the existence in the moving party of a more narrow interest than those represented by the current parties may justify intervention, the cases so holding primarily involve situations in which the court must perform a quasi-administrative function, *N.R.D.C. v. Costle, supra; United States v. Reserve Mining Co., supra;* or where the interests of the governmental representative of individual claims is actually adverse to those claims. *State of New Mexico v. Aamodt,* 537 F.2d 1102 (10th Cir. 1976) (Navajo Indians permitted to intervene in water rights suit despite U.S. duty to represent them since U.S. interest in the suit was adverse to Indian water claims); or where the provision in question specifically deals with an area of economic regulation which the state admittedly could not adequately represent, *P.I.R.G. v. Regents, supra.* The present case involves none of these situations. This case deals only with the adequacy of the salinity standards promulgated by the states and whether the Administrator fulfilled his statutory duty in approving these plans. As such, the parties are limited to arguing for or against the validity of these regulations. Individual interests such as those U.P.&L. seeks to advance are largely irrelevant. U.P.&L.'s arguments directed at the subject matter of his case will be cumulative of the arguments advanced by the other defendants. Therefore, this court is of the opinion that U.P.&L. is adequately represented in this case, and the motion to intervene as of right is accordingly denied.

D. *Intervention Group II*

The final motion to intervene was filed by a group of four diverse entities from a variety of the Basin states. The Mountain States Legal Foundation is a non-profit public interest law center which states that it seeks to intervene on behalf of its directors, officers, supporters and other individuals who rely on the water of the Colorado River for consumptive uses. The National Water Resources Association represents the water users of 18 Western States. Some of its members rely on the Colorado River for irrigation and municipal water supplies. The Colorado Water Congress represents 1,800 individual water users within the state of Colorado, most of whom are either municipalities or industries. Finally, the Yuma Auxillary Project is an irrigation district in southern Arizona which contracts with the United States for the use of the Colorado River waters for irrigation. These four groups seek jointly to protect their members' interests in maintaining their consumption rights to the Colorado River waters are presently allocated under the existing interstate water compacts among the Basin states.

Because of the flexible standards applied to the determination of whether a proposed intervenor has an interest in

a case at all, it would be difficult to say that these four intervenors do not possess such an interest since all of them represent people and corporations which use the Colorado River water in one way or another. Similarly, because the end product of this suit might be that new, more restrictive regulations may be made, it is difficult to say that the proposed intervenors will not be practically impeded in the defense of their interests if intervention is denied. However, the interests expressed by the intervenors in Group II are so general that it must, as a matter of law, be stated that the states adequately represent those interests. There is no evidence of any disagreement between the states and the intervenors in this group. The interests advanced are shared by all the citizens of the Basin states and therefore the representation of those general, non-adverse interests should be left to the states under the doctrine of *parens patriae* as outlined above. If such were not the case, there would be no limit to the intervention as of right which might occur. Therefore, because the entities in Group II represent general interests shared by the entire populations of the intervening states, intervention as of right should be denied. *See Stream Pollution Control Board of the State of Indiana v. U.S. Steel Corp.*, 61 F.R.D. 31, 35 (N.D. Ind. 1974), *aff'd* 512 F.2d 1036 (7th Cir. 1975) (individual intervention into suit to abate whether pollution denied where proposed intervenor's only interest in suit was same as that of the general public).

II. *Permissive Intervention.*

All of the entities moving for intervention as of right have also moved in the alternative for permissive intervention. Under Federal Rule of Civil Procedure 24(b), the court may permit intervention when the applicant's claim or defense has a common issue of law or fact with the main action, and where the court in the exercise of its sound discretion determines that the intervention will not unduly delay or prejudice the adjudication of the case of the original parties. A motion for permissive intervention is addressed to the court's discretion, and the court's action on such a motion will not be reversed unless the court abused its discretion. *Brewer v. Republic Corp.*, 513 F.2d 1222 (6th Cir. 1975); *Garrett v. United States*, 511 F.2d 1037 (9th Cir. 1975).

Regarding the entities in Intervention Group I, and the Metropolitan Water District of Southern California, the doctrine of *parens patriae* indicates that it may be prejudicial to the states which have already intervened in this suit to allow the various political subdivisions of the states the opportunity to question state policy which the entities might not otherwise have. Since as a matter of law these entities are represented by the states, any evidence they offer will be merely cumulative, and in that respect an unwarranted delay will occur. Therefore, this court will, in the exercise of its discretion, deny permissive intervention to the entities in Group I and to the Metropolitan Water District of Southern California.

The situation presented by Utah Power and Light is analogous. U.P.&L. has indicated no way in which it will supplement the position already taken by the other parties. The views of U.P.&L. has indicated that it will express are unlikely to be helpful to this court in the resolution of this matter. *Commonwealth Edison Co. v. Train*, 71 F.R.D. 391 (N.D. Ill. 1976). Therefore, this court should in the exercise of its discretion deny permissive intervention to Utah Power and Light.

The entities in Intervention Group II present a somewhat different situation. These entities have indicated that regardless of the type of intervention they receive, they seek intervention for the sole purpose of assuring that this court gives adequately consideration to the various interstate compacts regulating water use in the Colorado River Basin, and the extent to which Congress and the courts have adopted these compacts. Examination of the answers

submitted by the states indicates that only New Mexico and Wyoming advance any arguments based on these compacts. However, neither of these two states seem to intend to engage in the depth of analysis promised by the entities in Group II. These interstate conferences and compacts are crucial to an understanding of the problems faced by the Basin states and the Administrator in adopting salinity control plans. As such, the information offered by the entities in Group II would appear to be helpful to the court in the consideration of this matter. *Commonwealth Edison Co. v. Train, supra.* Therefore, the court will permit the entities in Group II to intervene for the limited purpose of briefing the court on the extent and effect of the various interstate water use compacts in the Colorado River Basin.

An appropriate Order accompanies this Memorandum Opinion.

THOMAS A. FLANERY
UNITED STATES DISTRICT JUDGE

DATED: April 20, 1978

[Caption Deleted in Printing]

ORDER

This matter comes before the court on four motions to intervene. Upon consideration of the motions, the memoranda submitted in support thereof and in opposition thereto, and the entire record now before the court, and for the reasons stated in the memorandum filed in this case this same day, it is, by this court, this 20th day of April, 1978,

ORDERED that the motion for intervention as of right, or alternatively for permissive intervention, submitted by the Colorado River Water Conservation District; the Southwestern Water Conservation District; the Northern Colorado Water Conservancy District; the city of Colorado Springs, Colorado; the city of Aurora, Colorado; the Board of Water Works of the City of Pueblo, Colorado; and the city and county of Denver, Colorado be, and the same hereby is, denied; and it is further

ORDERED that the motion for intervention as of right, or alternatively for permissive intervention, submitted by the Metropolitan Water District of Southern California be, and the same hereby is, denied; and it is further

ORDERED that the motion for intervention as of right, or alternatively for permissive intervention, submitted by the Utah Power and Light Co. be, and the same hereby is denied; and it is further

ORDERED that the motion for intervention as of right, or alternatively for permissive intervention, submitted by the Mountain States Legal Foundation, the National Water Resources Association, the Colorado Water Congress, and the Yuma Auxillary Project be, and the same hereby is, granted in part and denied in part; and it is further

ORDERED that the Mountain States Legal Foundation, the National Water Resources Association, the Colorado Water Congress, and the Yuma Auxillary Project be, and hereby

are, permitted to intervene as a group for the limited purpose of briefing this court on matters regarding the various interstate water use compacts in the Colorado River Basin.

/s/ THOMAS A. FLANNERY
UNITED STATES DISTRICT JUDGE

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

Civil Action No. 77-1436

No. 78-1471

ENVIRONMENTAL DEFENSE FUND, INC.

v.

DOUGLAS M. COSTLE, AS ADMINISTRATOR U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.

UTAH POWER AND LIGHT COMPANY, *Appellant*

No. 78-1515

Civil Action No. 77-1436

ENVIRONMENTAL DEFENSE FUND, INC.

v.

DOUGLAS M. COSTLE, AS ADMINISTRATOR U.S. ENVIRONMENTAL PROTECTION AGENCY

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, *Appellant*

No. 78-1566

Civil Action No. 77-1436

ENVIRONMENTAL DEFENSE FUND, INC.

v.

DOUGLAS M. COSTLE, AS ADMINISTRATOR U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL., *Appellant*

Filed July 31, 1978

BEFORE: WRIGHT, Chief Judge; MCGOWAN, Circuit Judge

ORDER

On consideration of appellants' motions for summary reversal, of appellees' motions for summary affirmance, of the motions by Environmental Defense Fund for oral argument and to strike affidavit in appellant Utah Power and Light Company's papers, of the responses filed with respect to the foregoing motions, and, for the reasons set forth in the attached memorandum, it is

ORDERED by the Court that the appellants' motions for summary reversal are denied, it is

FURTHER ORDERED that the motion to strike affidavit attached to appellant Utah Power and Light Company's papers is granted and, it is

FURTHER ORDERED by the Court that appellees' motions for summary affirmance are granted and the order of the District Court on appeal herein be, and the same hereby is, affirmed.

The Clerk is directed to transmit a certified copy of this order to the District Court.

Per Curiam

MEMORANDUM

We affirm the order of the District Court denying intervention to appellants. Since the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming have intervened, in our view the case is governed by *New Jersey v. New York*, 345 U.S. 369 (1953), and under the *parens patriae* principle set forth in that case, intervention

as of right must be denied.[1] That "principle is a *necessary recognition* of sovereign dignity, as well as a working rule for good judicial administration." *Id.* at 373 (emphasis supplied). When the views of appellants are identical to those of their states, there is no need for intervention; when the views of appellants differ from those of their states, those differences are to be resolved through the internal mechanisms, such as the political processes, of the sovereign states rather than by the federal courts.

We have considered appellants' efforts to distinguish *New Jersey v. New York*, and we do not find them persuasive.[2] Under the doctrine of that case, an "intervenor whose state is already a party should have the the burden of showing some *compelling interest in his own right*," *id.* at 373 (emphasis supplied). Appellant's stated justifications for intervention do not meet this strict test. Appellants urge that their states do not oppose intervention. Lack of state opposition, however, does not rise to the level of a compelling interest in separate representation. The states may not readily relinquish their sovereign function of resolving differences (if any) among their political subdivisions' and citizens' views on water plans and rights as they relate to this case once they have intervened to represent those subdivisions and citizens. Appellant Metropolitan Water District of Southern California (Southern California) urges that its interests created by federal statutes and water contracts cannot be adequately represented by the

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[1] We also do not find that the District Court abused its broad discretion to deny permissive intervention.

[2] The Supreme Court's opinion in that case places little emphasis on the fact that the case was within the Court's original jurisdiction, and does not even mention the wording of Fed. R. Civ. P. 24(a) of that time.

State of California. In the context of this case, we do not find that its interests require seperate representation.[3]

We emphasize that our decision imports no view whatsoever on the merits of the case, which were neither briefed for the Court not considered by it on these motions.

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[3] We are not surprised that the states welcome intervention on their side. The position of the states was a factor relevant to the District Court's decision on permissive intervention, but we do not find that it creates mandatory intervention rights.

Southern California has not made the showing of *concrete* adverse interests of state and locality in this context required to find that separate representation is necessary in this case. We assume that if the District Court found, in the course of deliberation on the merits, that some major argument or claim advanced by California had to be rejected solely on the grounds that it was personal to the absentee Southern California, *cf. New Mexico* v *Aamodt*, 537 F.2d 1102, 1107 (10th Cir. 1976), that the District Court would reconsider granting Southern California limited intervention.

APPENDIX "C"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action File Number 77-1436

ENVIRONMENTAL DEFENSE FUND, INC., *Plaintiff*,

—VS—

DOUGLAS M. COSTLE, as Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., *Defendants*.

Received February 6, 1978

MEMORANDUM IN SUPPORT OF UTAH POWER AND LIGHT COMPANY'S MOTION TO INTERVENE AS A DEFENDANT

The State of Wyoming respectfully submits this Memorandum in support of the pending motion of Utah Power and Light Company to intervene as a party defendant. The State of Wyoming so submits this Memorandum in the belief that Utah Power has demonstrated its entitlement to intervention in accordance with the requirements of Rule 24 of the Federal Rules of Civil Procedure, as so thoughtfully and liberally interpreted in the decisions of the Court of Appeals for the District of Columbia Circuit.

In supporting her own motion to intervene in this action, the State of Wyoming pointed out that she was seeking to protect "the broad interests" that are at issue in this action, including "her sovereign interest in the protection of water quality standards and implementation plan for salinity, her proprietary interests in waters claimed by the State pursuant to the Colorado River Compact and the Upper Colorado River Basin Compact, and her concern for the protection of numerous and diverse economic interests which are accordingly endangered." (Wyoming Brief in Support of Motion to Intervene as a Defendant, page 6).

Utah Power is a significant supplier of electrical energy to consumers in the State of Wyoming. Utah Power has the right to withdraw 81,895 acre feet of water per year from the Colorado River drainage for its use in Wyoming, thus making it clear that water from the Colorado River drainage is "absolutely essential to the present and future operation of steam-electric generating units in the States of Wyoming and Utah." (Memorandum of Points and Authorities in Support of Utah Power and Light Company for Leave to Intervene, page 2). the plaintiff and federal defendants do not challenge Utah Power's interests in the subject matter of this action, but argue that those interests are adequately represented by the existing parties, particularly the states.

The State of Wyoming wishes to emphasize that while the State may share "general agreement" with Utah Power concerning the adequacy of existing regulations of Colorado River salinity, it would be erroneous to assume that the State is representing or can adequately represent the specific interests of Utah Power that are at issue in this proceeding. To the contrary, Wyoming's interests are not only far more diverse than those of Utah Power, but indeed may at times be in conflict with those of Utah Power. Therefore, the State cannot fairly be charged by this Court with protecting and representing the specific interests of Utah Power in this litigation.

The State of Wyoming must stress that she is not insensitive to this Court's expressed concern at the January 18, 1978, status call that this action not be overburdened by a multitude of intervening defendants. However, although this action has now been pending for five months, Utah Power is the only utility in the entire seven-state Colorado River Basin to seek intervention in order to protect its interests.

Moreover, this Court very amply demonstrated at the January 18, 1978, status call that it fully possesses the capacity, the will and the power to prevent any abuse of the Court's process by any of the parties to this litigation.

In order that Utah Power may be enabled to protect the specific interests which it asserts, and for all the reasons set forth above and in the memoranda of Utah Power and Light Company, the State of Wyoming respectfully requests that the Motion of Utah Power and Light Company for leave to intervene as a party defendant be granted.

Respectfully submitted,

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/s/ Jack D. Palma II
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-658, 78-678

UTAH POWER & LIGHT COMPANY and COLORADO RIVER WATER CONSERVATION DISTRICT, *et al.*, *Petitioners*,

v.

ENVIRONMENTAL DEFENSE FUND, INC.;

and

DOUGLAS M. COSTLE, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT ENVIRONMENTAL DEFENSE FUND, INC. IN OPPOSITION

GEORGE W. PRING
PAULA C. PHILLIPS
1657 Pennsylvania Street
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-658

UTAH POWER & LIGHT COMPANY, *Petitioner*,

v.

ENVIRONMENTAL DEFENSE FUND, INC.;

and

DOUGLAS M. COSTLE, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Respondents.*

No. 78-678

COLORADO RIVER WATER CONSERVATION DISTRICT, *et al.*, *Petitioners*,

v.

ENVIRONMENTAL DEFENSE FUND, INC.;

and

DOUGLAS M. COSTLE, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT ENVIRONMENTAL DEFENSE FUND, INC. IN OPPOSITION

OPINIONS BELOW

The opinions of the District Court and the Court of Appeals for the District of Columbia Circuit are fully presented in the briefs for the petitioners. The opinions are now unofficially reported at 12 BNA Env. Rep. Cas. 1001 (D.D.C. 1978); 12 BNA Env. Rep. Cas. 1255 (D.C. Cir. 1978).

JURISDICTION

The jurisdictional requisites adequately appear in the petitioners' briefs.

STATUTE INVOLVED

At issue in these intervention denials is Rule 24(a)(2) of the Federal Rules of Civil Procedure,[1] which provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

[1] Although petitioners Colorado River Water Conservation District *et al.* include Fed. R. Civ. P. 24(b) (permissive intervention) as a "statute involved" in this case, petitioners do not challenge the District Court's denial of permissive intervention under that Rule. Such a denial is unappealable absent abuse of discretion. *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 524-25 (1947). Petitioners did not raise the issue of permissive intervention in the Court of Appeals.

QUESTION PRESENTED

This lawsuit challenges federal government approval of inadequate, state-adopted water quality standards and control plans for salinity pollution in the Colorado River Basin. Below, twenty applicants—the seven basin states and thirteen substate entities—have moved to intervene in support of federal defendants. The District Court granted intervention to the seven states, granted limited intervention to four other applicants, and denied intervention to the nine remaining applicants. The question presented is:

Whether the District Court so abused its discretion or misapplied the law in granting and denying intervention to the twenty applicants before it as to justify overturning the District Court's decision and the Court of Appeals' summary affirmance.

STATEMENT OF THE CASE

Salinity pollution is acknowledged to be "the most serious water quality problem in the Colorado River Basin."[2] In 1972, the seven Colorado River Basin

[2] U.S. ENVIRONMENTAL PROTECTION AGENCY, THE MINERAL QUALITY PROBLEM IN THE COLORADO RIVER BASIN, SUMMARY REPORT (1971) at 5. *See* DEPARTMENT OF THE INTERIOR, *et al.*, FINAL ENVIRONMENTAL STATEMENT, COLORADO RIVER WATER QUALITY IMPROVEMENT PROGRAM (1977) at I-8 through I-21.

Salinity, in fresh water, is the total of all dissolved solids or salts present (TDS). Salinity decreases crop yields and potability, damages domestic and industrial facilities and equipment, causes increased treatment costs and environmental damage, and, at high levels or prolonged exposure, poses a serious hazard to human health. Federal defendants estimate the "economic magnitude" of salinity damages to be one to 1.5 billion dollars (present value) between now and the year 2000 without effective controls. *Id.* at I-21. These damages will be suffered by the more than two million

states adopted a policy of maintaining salinity concentrations at or below levels then found in the river's lower main stem.[3] In 1974, Congress incorporated this policy in the Colorado River Basin Salinity Control Act.[4] In 1975-76, pursuant to Section 303 of the Federal Water Poilution Control Act,[5] each of the seven basin states formally adopted water quality standards and implementation plans for salinity that included maintenance of 1972 salinity levels. Each state's standards and plan were approved by the Environmental Protection Agency.[6]

Plaintiff Environmental Defense Fund (EDF) brought this action on August 22, 1977, challenging the inadequacy of the state standards and plans to achieve their own agreed objective—maintenance of 1972 salinity levels. Naming as defendants the Administrator of the Environmental Protection Agency (EPA), the Secretary of the Interior, and the Commissioner of the Bureau of Reclamation, EDF's six-count complaint requests declaratory, injunctive, and mandatory relief (a) to set aside EPA's approval of the deficient state-

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Americans residing in the 242,000-square-mile basin and by the additional twelve million people outside the basin who rely on diversions of Colorado River water for agricultural, industrial, and domestic uses.

[3] U.S. Environmental Protection Agency, Proceedings, Conference In The Matter of Pollution of The Interstate Waters of The Colorado River and Its Tributaries (Apr. 26-27, 1972) at 169.

[4] Section 201(a), 43 U.S.C. § 1591(a) (Supp. V 1975).

[5] 33 U.S.C. § 1313 (Supp. V 1975).

[6] EPA approved the state standards and plans by letters of Oct. 8, 19, 22, and 23, 1976.

promulgated water quality standards and implementation plans for salinity pollution, (b) to require EPA to develop (through public proceedings) effective controls on salinity, and (c) to require all defendants to develop and implement necessary salinity control measures.[7]

During the six months following filing of the complaint, twenty public and private entities moved for intervention on the side of the federal defendants: the states of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming; Mountain States Legal Foundation; National Water Resources Association; Colorado Water Congress; Yuma Auxiliary Project; Metropolitan Water District of Southern California; Colorado River Water Conservation District; Southwestern Water Conservation District; Northern Colorado Water Conservancy District; City of Colorado Springs Water Conservancy District; City of Aurora, Colorado; Board of Water Works, City of Pueblo, Colorado; City and County of Denver Acting By and Through Its Board of Water Commissioners; and Utah Power & Light Company.

Both plaintiff EDF and federal defendants supported the intervention applications of the seven basin states as the authors of the challenged water quality standards and plans and as the representatives of their citizens' interests in the case. Both plaintiff EDF *and*

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[7] The lawsuit is based on defendants' violations of three federal statutes: the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (Supp. V 1975), as amended; the Colorado River Basin Salinity Control Act of 1974, 43 U.S.C. § 1591 *et seq.* (Supp. V 1975); and the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1970), as amended.

federal defendants opposed the intervention of the thirteen various substate entities.

On January 19, 1978, the District Court granted the motions to intervene of the seven basin states. On April 20, 1978, the Court issued a 17-page opinion and order granting limited intervention to Mountain States Legal Foundation, National Water Resources Association, Colorado Water Congress, and Yuma Auxiliary Project, and denying intervention to the remaining nine substate applicants.[8] The nine entities denied intervention promptly moved for summary reversal. Plaintiff EDF and federal defendants both moved for summary affirmance. By *per curiam* order of July 31, 1978, the Court of Appeals for the District of Columbia Circuit affirmed the District Court's order.[9]

Utah Power & Light Company, one of the public utilities in the basin, petitioned this Court for a writ of certiorari on October 18, 1978. Colorado River Water Conservation District; Southwestern Water Conservation District; Northern Colorado Water Conservancy District; City of Colorado Springs; City of Aurora; Board of Water Works, City of Pueblo; and the City and County of Denver—all state or municipal water suppliers in the basin—petitioned for a writ of certiorari on October 20, 1978.[10]

During the pendency of these intervention motions and appeals, the case has proceeded toward trial in the District Court. By order of December 23, 1977, the District Court denied federal defendants' motion for transfer of venue to the District of Colorado.[11] By order of September 1, 1978, the Court denied defendants' motions for judgment on the pleadings.[12] Discovery is now almost completed, and plaintiff anticipates moving for summary judgment on all or the majority of the counts in early 1979.

[8] Opinion reproduced in full in petitioners' briefs.

[9] *Id.*

[10] The Metropolitan Water District of Southern California did not petition for a writ of certiorari.

ARGUMENT

Petitioners, eight of twenty applicants in intervention in this case, seek review of their intervention denials by the District Court as affirmed by the Court of Appeals for the District of Columbia Circuit. All petitioners seek the identical outcome as the federal defendants, *viz.*, validation of present state and federal control plans for salinity pollution. On the law and the facts of this case, the petitions for a writ of certiorari should be denied.

Faced with a factually complex case with significant implications for resource planning and development for a large geographic region, the District Court carefully weighed the numerous intervention requests before it, considering both the applicants' stake in the outcome and their potential contribution to it. It exercised its discretion with considerable delicacy, admitting as intervenors of right the seven state applicants, admitting for limited purposes four substate applicants, and denying intervention to the nine remaining substate applicants.

[11] This order is unofficially reported at 12 BNA Env. Rep. Cas. 1079 (1977).

[12] This order is unofficially reported at 12 BNA Env. Rep. Cas. 1131 (1978).

Such discretion is controlled by the terms of Federal Rule of Civil Procedure 24(a)(2), which provide:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The District Court based its denial of intervention to petitioners upon its finding that their interests were adequately represented by existing parties.[13] Petitioners' challenge to these decisions of the trial judge familiar with the case and the reviewing appellate court is really an attack upon the representative capacity of the states and a demand for special treatment among the millions of citizens with an equivalent interest in controlling salinity pollution in the basin. The opinions of the courts below are clearly correct.

I. The Opinion of the District Court

The opinion of the District Court is a model of careful application of established precedent to the facts before the court. In its 17-page opinion, the District Court considered in turn the merits and demerits of each applicant's claim to intervention of right.

[13] EDF fully supports the District Court's denial of intervention and the Court of Appeals' affirmance based upon adequacy of representation. EDF continues to maintain, however, that petitioners meet *none* of the three requisites for intervention. Their alleged interests and impairments are so generalizd, speculative, and irrelevant to the specific issues of the case that they cannot support intervention of right unless that right extends to every one of the million of Colorado River water users.

A. Colorado River Water Conservation District, et al.

Turning first to petitioners Colorado River Water Conservation District, *et al.*, the Court recognized at the outset that "the seven entities in this group are all state or municipal public entities from the state of Colorado." [14]

The District Court undertook a lengthy consideration of adequacy of representation. The starting point for this analysis was this Court's holding in *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972) that intervenors' burden of demonstrating potential inadequacy of representation is a minimal one. The Court then examined at length the federal court precedents relied upon by the applicants in intervention, correctly concluding that the narrow scope of judicial review applicable here and petitioners' intimate relationship with the existing state parties distinguish the instant case.[15]

For additional guidance, the District Court looked to this Court's enunciation of the doctrine of *parens patriae* in *New Jersey* v. *New York*, 345 U.S. 369 (1953). That case arose in a factual setting strikingly similar to the one at bar. In an original action by the

[14] Memorandum Opinion and Order (D.D.C. April 20, 1978), reproduced as Appendix 2 to Petition of Colorado River Water Conservation District *et al.* (hereafter cited as "D. Ct. Op., Colo. Districts' brief") at 9a.

[15] The cases analyzed by the District Court are *Natural Resources Defense Council* v. *Costle*, 561 F.2d 904 (D.C. Cir. 1977); *United States* v. *Reserve Mining Co.*, 56 F.R.D. 408 (D. Minn. 1972); and *New York P.I.R.G., Inc.* v. *Regents of Univ. of State of New York*, 516 F.2d 350 (2d Cir. 1975). *See* D. Ct. Op., Colo. Districts' brief at 12a-14a.

state of New Jersey challenging the state of New York's planned diversion of Delaware River water, the state of Pennsylvania had successfully moved to intervene. When Philadelphia, a home-rule city, sought to intervene several years later when New York petitioned to reopen the case, this Court denied the additional intervention. The Court's reasoning, quoted by the District Court below and by the Court of Appeals in affirmance, bears clear relevance to this case:

> The "*parens patriae*" doctrine . . . is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, "must be deemed to represent all its citizens." *Kentucky* v. *Indiana,* 281 U.S. 163, 173-174 (1930). The principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

345 U.S. at 372-373.

Pinpointing a problem of identical concern in the instant case, the *New Jersey* Court explained the serious complications that a contrary rule would raise:

> The City of Philadelphia represents only a part of the citizens of Pennsylvania who reside in the watershed area of the Delaware River and its tributaries and depend upon those waters. If we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth. Furthermore, we are told by New Jersey that there are cities along the Delaware River in that State which, like Philadelphia, are responsible for their own water systems,

> and which will insist upon a right to intervene if Philadelphia is admitted. Nor is there any assurance that the list of intervenors could be closed with political subdivisions of the states. Large industrial plants which, like cities, are corporate creatures of the state may represent interests just as substantial.

Id. at 373 (footnote omitted). Therefore, the Court concluded: "An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *Id.*

As the District Court below recognized, although *New Jersey* v. *New York* involved this Court's original jurisdiction, the principle and rationale of *parens patriae* there enunciated are not to be mechanically limited to Supreme Court practice, but may be considered and applied by other courts, as well.[16]

Completing its consideration of the intervention application of petitioners Colorado River Water Conservation District *et al.*, the District Court found on the facts and record in this case:

> All of the entities in Group I are state agencies or offices, or municipalities within the state of Colorado. None have offered any compelling reason or circumstance in which they validly differ with the position taken by the state of Colorado. The formulation of these salinity control standards were expressly left to the states of the Colorado

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[16] *See* D. Ct. Op., Colo. Districts' brief, at 15a-16a, citing *Pennsylvania* v. *Rizzo,* 530 F.2d 501, 505 (3d Cir.), *cert. denied,* 426 U.S. 921 (1976).

> River Basin. The various public subdivisions which here seek to intervene do not allege that the states or the federal government acted illegally in promulgating these regulations. The issues of the allocation of the water levels approved, or the implementation of these regulations are not before this court. As such, the interests advanced by these proposed intervenors in upholding the validity of these previously promulgated regulations would appear to be identical with those interests advanced by the states.[17]

Accordingly, the Court denied intervention of right because representation by the state intervenors was adequate.

B. Utah Power & Light Company

Turning to the intervention motion of Utah Power & Light Company (UP&L), the District Court once again took up the question of adequate representation. The Court was clearly impressed by the affirmative averments of representative capacity submitted to the Court by UP&L's states of residence:

> The states of Utah and Wyoming represented to the court in their motions to intervene that they could protect the interests shared by their citizenries in water quality control, water resource planning and allocation, and the various forms of economic development dependent on the river.[18]

As the court recognized, UP&L did not quarrel with these representations, but rather claimed a "more specific" interest demanding separate representation.

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[17] *Id.* at 16a.

[18] D. Ct. Op., Colo. Districts' brief, at 18a. These representations are quoted in part in footnote 41, *infra*.

Again beginning its analysis with *Trbovich* v. *United Mine Workers*, the District Court noted that the burden of showing inadequate representation, though minimal, remains upon the applicant in intervention. Surveying relevant federal court cases,[19] the Court concluded that assertion of a narrower interest than that of a party to the case will support intervention where (1) the court will perform a quasi-administrative function, (2) the applicant's interest is actually adverse to the governmental representative's, or (3) the case involves an area of economic regulation in which the state admits its representative incapacity. None of these conditions, the court observed, pertain here:

> This case deals only with the adequacy of the salinity standards promulgated by the states and whether the Administrator fulfilled his statutory duty in approving these plans. As such, the parties are limited to arguing for or against the validity of these regulations. Individual interests such as those U.P.&L. seeks to advance are largely irrelevant.[20]

Moreover, the District Court specifically found that "UP&L's arguments directed at the subject matter of this case will be cumulative of the arguments advanced by the other defendants."[21] For these reasons and on

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[19] *Natural Resources Defense Council* v. *Costle*, 561 F. 2d 904 (D.C. Cir. 1977); *United States* v. *Reserve Mining Co.*, 56 F.R.D. 408 (D. Minn. 1972); *New Mexico* v. *Aamodt*, 537 F.2d 1102 (10th Cir. 1976) *cert. denied*, 429 U.S. 1121 (1977); *New York P.I.R.G., Inc.* v. *Regents of Univ. of State of New York*, 516 F.2d 350 (2d Cir. 1975).

[20] D. Ct. Op., Colo. Districts' brief, at 18a-19a. (Petitioners omit the word "only" from their reproduction of this passage from the District Court's opinion.)

[21] *Id.* at 19a.

the clear facts of this record, the Court denied UP&L's motion for intervention of right.

II. The Opinion of the Court of Appeals

Affirming *per curiam* the District Court order, the Court of Appeals for the District of Columbia relied primarily on the guidance of *New Jersey* v. *New York* and the principle of *parens patriae*. Like the District Court, the Court of Appeals was obviously influenced by the states' authoritative assertions of representativeness upon their own motions to intervene, noting:

> The states may not readily relinquish their sovereign function of resolving differences (if any) among their political subdivisions' and citizens' views on water plans and rights as they relate to this case once they have intervened to represent these subdivisions and citizens.[22]

Concluding that the record did not demonstrate that appellants possessed any "compelling interest in [their] own right" warranting mandatory intervention,[23] the Court of Appeals affirmed the District Court order denying intervention.

III. Petitioners' Arguments

This detailed review of the opinions of the District Court and Court of Appeals below is made necessary

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[22] Memorandum opinion (D.C. Cir. July 31, 1978), reproduced as Appendix 1 to Petition of Colorado River Water Conservation District, *et al.* (hereafter cited at "Ct. Aps. Op., Colo. Districts' brief") at 3a-4a.

[23] *Id.* at 3a, quoting *New Jersey* v. *New York*, 345 U.S. at 373. Although the Court of Appeals referred to this test as "strict," it made clear in a footnote that a "showing of *concrete* adverse interests of state and locality in this context" would be sufficient to secure intervention of right. *Id.* at 4a, n. 3.

by the arguments of petitioners, who seek to oversimplify and trivialize beyond recognition the work of these courts in coping sensitively and fairly with numerous intervention requests in a large and complex case. Casting about for some issue that might "dress up" their routine appeal in Supreme Court style, petitioners seize upon the lower courts' consideration of the *parens patriae* principle of *New Jersey* v. *New York* and attempt to tear it from the context of the lower court opinions.

Petitioners insist that the doctrine of *parens patriae* applies only in cases brought under this Court's original jurisdiction, because *New Jersey* v. *New York* was such a case.[24]

As the Court of Appeals pointed out below, however, the opinion in that case "places little emphasis on the fact that the case was within the Court's original jurisdiction. . . ."[25] The *New Jersey* Court stated that the *parens partiae* doctrine:

> is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, "must be deemed to represent all its citizens." *Kentucky* v. *Indiana*, 281 U.S. 163, 173-174 (1930). The principle is a necessary recognition of sovereign dignity, as well as a working

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[24] UP&L brief at 9-12; Colo. Districts' brief at 9-10. UP&L notes that "every opinion of this Court citing *New Jersey* has been in a case involving original jurisdiction." UP&L brief at 10, n. 4. This is true. The Supreme Court has cited *New Jersey* only twice, in *Illinois* v. *City of Milwaukee, Wisconsin*, 406 U.S. 91, 96-97 (1972) and *United States* v. *Nevada*, 412 U.S. 534, 538 (1973). Both of these cases "involved" the Court's original jurisdiction, and in both the Court declined to exercise it.

[25] Ct. Aps. Op., Colo. Districts' brief at 3a, n. 2.

> rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

345 U.S. at 372-73. This language clearly transcends the technical procedural posture of that one case.

Petitioners would ignore this Court's emphasis that *parens partiae* is a "*principle.*" This Court is not in the business of announcing single rules for single cases. It deals, instead, in "principles"—broad precepts that serve as the foundation for practical rules in various settings. Accordingly, the Court recognized the principle of *parens patriae* as a "working rule for good judicial administration": a *working* rule, practical and readily available, for good *judicial administration*, not just Supreme Court administration, not just awed scholarly reference. So was it applied by the courts below, as one practical guide in their consideration of adequacy of representation.

The working rule is a familiar one in a variety of descriptive terms and contexts. "[I]n the absence of a very compelling showing to the contrary, it will be assumed . . . that a state adequately represents the interests of its citizens." 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1909 at 528-29 (1972). In *Pennsylvania* v. *Rizzo,* 530 F.2d 501, 505, *cert. denied,* 426 U.S. 921 (1976), the Court of Appeals for the Third Circuit held:

> a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee. . . . Where official policies and practices are challenged, it seems unlikely that anyone could be better situated to defend than the governmental department involved and its officers.

See United States v. *Nevada,* 412 U.S. 534, 539 (1973) (interstate compact); *Stream Pollution Control Board of Indiana* v. *U.S. Steel, Inc.,* 62 F.R.D. 31, 35 (N.D. Ind. 1974), *aff'd,* 512 F.2d 1036 (7th Cir. 1975) (intervention); *Illinois* v. *Bristol-Myers Co.,* 470 F.2d 1276, 1278 (D.C. Cir. 1972) (intervention); *United States* v. *Crookshanks,* 441 F. Supp. 268, 270 (D. Or. 1977) (temporary restraining order).

Application of this rule is particularly appropriate here, where the states themselves possessed and exercised the ultimate authority to develop and adopt—following hearings at which interested citizens such as petitioners could make input—the very standards and plans at issue in this litigation, and petitioners seek merely to add their own redundant defense of the state standards and plans.

To counter the sensible application of *parens patriae* here, petitioners fix upon a sentence in this Court's opinion in *United States* v. *Nevada,* 412 U.S. 534 (1973). In that case, in which the Court declined to exercise its original jurisdiction, the Court did not state that individual water users would have a *right* to intervene in District Court. Rather, they would have "an opportunity to participate" in District Court proceedings, *id.* at 538—subject, as a matter of course, to the District Court's determination that the requisites of Rule 24(a)(2) were satisfied, including lack of adequate representation. Clearly the Court did not intend by this one sentence to predispose subsequent District Court proceedings by waiving the require-

ments of Rule 24(a)(2) without knowing even the identities of potential intervenors.[26]

Petitioners further urge that the use of *parens patriae* principle by the courts below "distort[s]" and "perver[ts]" Rule 24(a)(2)[27] and conflicts with its interpretation by this Court in *Trbovich* v. *United Mine Workers,* 404 U.S. 528 (1972).[28]

Trbovich was an action by the Secretary of Labor to set aside a union election of officers. An individual union member moved to intervene in support of the Secretary, and this Court ordered his motion granted. The Court, finding the union member's interest inadequately represented under Rule 24(a)(2), based its decision on the conflict of interest inherent in the Secretary's role under the Labor-Management Reporting and Disclosure Act, which imposed upon him a "duty to serve two distinct interests," one of which would clearly conflict with the applicant's interest. *Id.* at 538-39. In a footnote the Court added:

[26] UP&L resourcefully cites *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 U.S. 129 (1967) for the proposition that both a public utility and its parent state must be granted intervention in litigation in which they are interested. UP&L brief at 12, n. 5. The case is inapposite. The Supreme Court there granted intervention under former Rule 24(a)(3). That rule *imposed no requirement that inadequate representation by parties be demonstrated.* See 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1909 at 519 (1972). Further, the peculiar circumstances of *Cascade Natural Gas* limit the guidance it offers in other intervention cases. 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1908 at 498 and n. 16 (1972) and cases there cited.

[27] UP&L brief at 13, 14.

[28] *Id.* at 16-18; Colo. Districts' brief at 13-14.

> The requirement of the Rule is satisfied if the applicant shows that representation of his interest "may be" inadequate; and the burden of making that showing should be treated as minimal.

Id. at 538 n. 10.[29]

Had the courts below indeed applied a mechanical "*per se* rule of exclusion in which the state's participation in a lawsuit precludes any citizen of that state from intervening," as one petitioner interprets the opinions below,[30] Rule 24(a)(2) as illuminated by *Trbovich* would surely require reversal. The Courts below applied no such mechanical or absolute rule. The District Court began its analysis of adequacy of representation with reaffirmation of the *Trbovich* "minimal burden" standard[31] and then closely scrutinized the individual circumstances of the various applicants in intervention. It specifically found the

[29] Petitioners also cite *Hodgson* v. *United Mine Workers,* 473 F.2d 118 (D.C. Cir. 1972) and *Natural Resources Defense Council* v. *Costle,* 561 F.2d 904 (D.C. Cir. 1977) as cases adopting the *Trbovich* standard. Like *Trbovich,* however, neither case involves the adequacy of representation by a *state* of its citizens' interests. In *Costle,* distinguished by the District Court in its opinion below, Colo. Districts' brief at 12a, had the applicant rubber and chemical companies been denied intervention, their interests would have been "represented" in the action only by their competitors and the U.S. Environmental Protection Agency. In *Hodgson,* as in *Trbovich,* the purported "representative" was clearly compromised by statute. Moreover, the Court there specifically found that the relief sought by the purported "representative" falls short of what [intervenor-applicants] themselves would reasonably ask." 473 F. 2d at 130. Petitioners advance no such specific conflict in representation here.

[30] UP&L brief at 14.

[31] D. Ct. Op., Colo. Districts' brief, at 11a.

interests of the Colorado water users to be "*identical*" to the states' interests,[32] and those of UP&L to be not "actually adverse" to the states' interests.[33] This is no "*per se* rule of exclusion."

In its affirmance the Court of Appeals concluded that the applicants had failed to show "some compelling interest in [their] own right" or "*concrete* adverse interests of state and locality."[34] This standard is well established in the federal courts. *See New Mexico* v. *Aamodt*, 537 F.2d 1102, 1105-06 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977) ("[S]ignificant confiicts of interest" rendered adequate representation "impossible."); *Neusse* v. *Camp*, 385 F.2d 694, 703 (D.C. Cir. 1967) ("[T]he mere fact that there is a slight difference in interests between the applicant and the supposed representative does not show inadequacy, if they both seek the same outcome."); *Stadin* v. *Union Electric Co.*, 309 F.2d 912, 919 (8th Cir. 1962) (per Blackmun, J.), *cert. denied*, 373 U.S. 915 (1963); *Peterson* v. *United States*, 41 F.R.D. 131, 134 (D. Minn. 1966).[35]

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[32] *Id.* at 16a (emphasis added).

[33] *Id.* at 18a.

[34] Ct. Aps. Op., Colo. Districts' brief, at 3a, 4a n. 3.

[35] Petitioners point with special indignation at their consignment by the Court of Appeals to "the internal mechanisms, such as the political processes," of the states. Ct. Aps. Op., Colo. Districts' brief, at 3a, quoted in UP&L brief at 14 and Colo. Districts' brief at 8-9, 10. In doing so, they overlook the very significant point the Court of Appeals is making about this particular case. Here, plaintiffs seek an order which would require the federal and state agencies to reopen public rulemaking to revise and improve salinity controls; this rulemaking is the "political process" in which these petitioners can properly advance their detailed opinions, expertise, and influence, and safeguard their specific interests, *on the merits*. Recognizing where the real decisionmaking will take place, the Court of Appeals was quite correct to suggest that these petitioners are one forum too early.

Petitioners have failed to satisfy the "minimal burden" standard of *Trbovich* because they have failed to make *any* showing of inadequacy of representation. Petitioners Colorado River Water Conservation District *et al.* are themselves all agencies or subdivisions of the State of Colorado and have not pointed out a single example of how the state might fail to represent them.[36] Petitioner UP&L claims broadly that "[t]he states and Utah Power are competing users of water"[37] but offers no record support for this assertion nor any indication of the manner in which any such competition might affect the states' representative capacity in this litigation. UP&L further argues that it is a "regulated user" of Colorado River water with "purely proprietary interests" distinct from the states', again offering no factual details on the record.[38] In fact, the intimate state regulation and public duties of public utilities under Utah and Wyoming law[39] suggest a concurrence, not a disparity, of interests.

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[36] These petitioners offer the argument that the Colorado River Basin Salinity Control Act of 1974 § 201, 43 U.S.C. § 1591 (Supp. V 1975) (CRBSCA) exclusively governs control of salinity in the Colorado River Basin, and asserts that no present party has raised this issue. Colo. Districts' brief at 6-7. In fact, this interpretation of CRBSCA has been fully argued by intervenors Mountain States Legal Foundation, *et al.* *See* Memorandum [of Mountain States Legal Foundation *et al.*] in Support of Motion to Dismiss: Matters Concerning the Role of Interstate Compacts of the Colorado River on the Claims Presented by Plaintiff (June 22, 1978) at 16-25.

[37] UP&L brief at 16.

[38] *Id.* at 17.

[39] *See, e.g.*, Utah Code Ann. § 54-3-1 (1953); Wy. Stat. Ann. § 37-3-114 (1977).

Petitioners protest, finally, that the courts below "ignored" filings by the states of Wyoming and Colorado purporting to disclaim an ability fully to represent petitioners' interests in this litigation.[40] On the contrary, the courts below did not ignore these filings. The courts simply discredited them, as they deserved. These memoranda were filed by Wyoming and Colorado only after their own interventions had been assured. Both the District Court and the Court of Appeals had before them EDF's response to these memoranda demonstrating that the belated state support for other movants (1) was in substantial conflict with the states' earlier assertions of representativeness made to gain their own intervention, (2) was based erroneously on alleged interests of the sub-state applicants in no way at issue in the action, and (3) directly conflicted with state constitutional and statutory provisions, cited by the states in their applications for intervention, conferring upon them the authority and duty to represent their citizens' interests.[41]

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[40] UP&L brief at 8; Colo. Users brief at 7, 11.

[41] *See* Plaintiff's Response to States' Memoranda in Support of Intervention by Additional Parties. In particular, EDF pointed out the detailed and comprehensive averments of representative capacity made by the states in support of their own intervention. Wyoming had declared, for example:

> "Water being essential to industrial prosperity . . . its control must be in the state, which, in providing for its use, shall equally guard all of the various interests involved."

Wyoming Motion to intervene as a defendant at 2-3, quoting from the Wyoming Constitution, art. 1, § 31.

> The broad interests sought to be asserted here by the State of Wyoming, as *parens patriae* and in her own right, include . . . her concern for the protection of numerous and diverse economic interests which are accordingly endangered.

CONCLUSION

The District Court and Court of Appeals carefully considered petitioners' motions to intervene in light of petitioners' individual interest and offerings, the nature of the case, and Rule 24(a) as interpreted by

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Id. at 6. Indeed, Wyoming *specifically claimed a UP&L facility* as one of the projects the state seeks to represent and protect in its intervention. *Id.* at 11.

Likewise, Colorado had represented to the court, for example:

> The Governor has directed the Attorney General to seek intervention in order that the State may advance interests of Colorado in water quality and water allocation questions directly affecting the citizens of this State . . . .

Motion for Intervention by the State of Colorado at 2-3.

The states' tardy, speculative, and self-contradictory support for petitioners' interventions clearly failed to impress the District Court as manifesting the concrete adversity or conflict of interest requisite to intervention of right. The Court of Appeals obviously intended a disparaging reference to such political back-pedaling when it stated:

> The states may not readily relinquish their sovereign function of resolving differences (if any) among their political subdivisions and citizens' views on water plans and rights as they relate to this case *once they have intervened to represent these subdivisions and citizens.*

Ct. Aps. Op., Colo. Districts' brief at 3a-4a (emphasis added). *See id.* at 4a, n. 3.

In its brief as *amicus curiae* in support of the petition for a writ of certiorari of Colorado River Water Conservation District, *et al.*, the State of Colorado renews its argument that these petitioners "are entitled . . . to a separate position" in water policy. *Id.* at 5. Nowhere, however, does Colorado give any indication of how the "positions" of the state and petitioners—its subdivisions and municipalities all seeking the same outcome in this case—are actually "separate" or different in any regard whatsoever. How many additional layers of governmental bureaucracy, all making the same arguments and representing the same position, must encumber these proceedings?

this Court. Petitioners have offered no special and important reasons for disturbing these orders. The writ of certiorari should be denied.

Respectfully submitted,

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Dated: November 29, 1978

Nos. 78-658 and 78-678

In the Supreme Court of the United States

OCTOBER TERM, 1978

UTAH POWER & LIGHT COMPANY, PETITIONER

v.

ENVIRONMENTAL DEFENSE FUND, INC., ET AL.

COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL., PETITIONERS

v.

ENVIRONMENTAL DEFENSE FUND, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order and memorandum of the court of appeals (Pet. App. 19a-22a)[1] are not yet reported. The memorandum opinion and order of the district court (Pet. App. 1a-18a) are reported at 12 Envir. Rep. 1001.

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[1]All "Pet. App." references in this brief will refer to the petition in No. 78-658, unless identified otherwise.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1978. The petition in No. 78-658 was filed on October 18, 1978, and the petition in No. 78-678 on October 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the petitioners' motions to intervene were properly denied because their interests were already adequately represented by existing parties.

RULE INVOLVED

Fed. R. Civ. P. 24(a) provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT

The Federal Water Pollution Control Act (the Act), 33 U.S.C. 1251 *et seq.*, directs the states and the federal government to take comprehensive action to restore and enhance the integrity of the nation's waters.[2] Section 303 of the Act, 33 U.S.C. 1313, requires the states to adopt water quality standards consistent with the goals of the Act, subject to the approval of the Administrator of the

[2]This comprehensive regulatory program is discussed in *E.I. duPont deNemours & Co.* v. *Train*, 430 U.S. 112, 116-121 (1977), and *EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 202-209 (1976).

Environmental Protection Agency (EPA). Section 303(b) provides that the Administrator shall promulgate satisfactory water quality standards should the states fail to do so. 33 U.S.C. 1313(b). In addition, Section 303 directs the states to develop planning processes designed, among other purposes, to implement the water quality control standards. 33 U.S.C. 1313(e).

The Environmental Defense Fund, Inc. (EDF) brought this action for declaratory, injunctive, and mandatory relief against the Administrator, the Secretary of the Interior, and the Commissioner of the Bureau of Reclamation. EDF alleged that the Colorado River salinity standards, which were adopted by the seven Colorado River Basin states and approved by the Administrator pursuant to Section 303 of the Act, did not comply with the Act. EDF sought an injunction requiring the Administrator to promulgate acceptable water quality standards, implementation plans, and pollutant loads, and directing EPA and Interior to take steps to maintain salinity in the Basin at 1972 levels (Pet. App. 1a-2a). Each of the seven Colorado River Basin states (Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming) sought to intervene as defendants, and the district court granted their unopposed motions (Pet. App. 2a).

Four other motions to intervene were filed by (Pet. App. 2a):

(1) the petitioners in No. 78-678, a group of state and municipal public entities from Colorado (referred to as "Group I");

(2) the Metropolitan Water District of Southern California;

(3) the petitioner in No. 78-658, Utah Power & Light Co.; and

(4) a group of organizations representing a variety of interests in the Basin (referred to as "Group II").

EDF and the federal defendants opposed these intervention motions, though certain of the intervening states supported particular intervention motions.

The district court denied the motions filed by Group I, by the Metropolitan Water District of Southern California, and by Utah Power & Light Co. on the ground that their interests were adequately represented by the states that had already been granted intervention, and that permissive intervention was not warranted (Pet. App. 1a-5a). The court granted Group II's motion for permissive intervention "for the limited purpose of briefing the court on the extent and effect of the various interstate water use compacts in the Colorado River Basin," since none of the parties had proposed to treat this subject in any depth (Pet. App. 15a-16a).

Group I, the Metropolitan Water District, and Utah Power & Light Co. then appealed, moving for summary reversal; the federal appellees and EDF responded with a motion for summary affirmance. The court of appeals summarily affirmed (Pet. App. 19a-22a). It held that under *New Jersey* v. *New York*, 345 U.S. 369 (1953), the would-be intervenors, whose states were already parties, had the burden of showing some compelling interest in their own right that justified intervention, and that they had failed to demonstrate the inadequacy of their states' representation of their interests. Accordingly, the court held that their motions to intervene as of right were properly denied. The court also concluded that the district court had not abused its discretion by denying permissive intervention (Pet. App. 21a n.1).

ARGUMENT

The court of appeals correctly applied established principles to the facts of this case, and there is no occasion for review by this Court.

1. Rule 24(a)(2) of the Federal Rules of Civil Procedure denies intervention as of right to an applicant

whose "interest is adequately represented by existing parties" to the litigation. See *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 537-539 (1972). It is well settled that where, as here, the federal government or a state is a party to litigation, its representation of the interests of its citizens is presumed to be adequate unless special circumstances are shown, and intervention is not permitted unless the applicant can demonstrate some special interest in its own right, distinct from the interests represented by the governmental parties on behalf of their citizens. *New Jersey* v. *New York*, 345 U.S. 369 (1953); *United States* v. *Associated Milk Producers, Inc.*, 534 F. 2d 113, 116-118 (8th Cir.), cert. denied, 429 U.S. 940 (1976); *Commonwealth of Pennsylvania* v. *Rizzo*, 530 F. 2d 501, 505 (3d Cir.), cert. denied, 426 U.S. 921 (1976); *Leech Lake Area Citizens Committee* v. *Leech Lake Band of Chippewa Indians*, 486 F. 2d 888 (8th Cir. 1973); *Illinois* v. *Bristol-Myers Co.*, 470 F. 2d 1276 (D.C. Cir. 1972). See *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689 (1961); *Associated Industries of Alabama, Inc.* v. *Train*, 543 F. 2d 1159 (5th Cir. 1976).[3]

Petitioners urge (78-658 Pet. 10-13; 78-678 Pet. 9-10) that this principle is peculiar to this Court's original cases,

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[3]The general rule is stated in 7A Wright and Miller, *Federal Practice and Procedure* §1909, at 525-529 (1972) (footnotes omitted), as follows:

> At the other extreme are those cases in which * * * there is a party charged by law with representing the interest of the absentee. In these situations representation will be presumed adequate unless special circumstances are shown.* * * This is the controlling principle also when a governmental body or officer is a named party. Thus, for example, in the absence of a very compelling showing to the contrary, it will be assumed that the United States adequately represents the public interest in antitrust suits and in a variety of other matters, that a state adequately represents the interest of its citizens, and that a school board adequately represents the patrons of a school.

such as *New York* v. *New Jersey, supra.* The authorities we have just cited refute this claim. In addition, the opinion in *New York* v. *New Jersey* demonstrates that that decision was founded on the nature of the state's representation as *parens patriae,* not on considerations relevant only to the Court's original jurisdiction. Thus, the Court stated (345 U.S. at 372-373):

> The "*parens patriae*" doctrine, however, has aspects which go beyond mere restatement of the Eleventh Amendment; it is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, "must be deemed to represent all its citizens." *Kentucky* v. *Indiana,* 281 U.S. 163, 173-174 (1930). The principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

It was on this broad rationale that the Court concluded (345 U.S. at 373):

> An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.

2. Petitioners also contend that they have demonstrated such compelling interests in their own right, and that these interests are potentially adverse to those of their states and cannot adequately be represented by the states. Utah Power urges (Pet. 15-16) that the states' interests are broader and more diverse than those of the utility, and that its interests as a regulated industry are often at odds with the interests of the states that regulate

it. The Group I petitioners, joined by the State of Colorado as *amicus curiae,* similarly argue that the State cannot adequately represent the special interests of the municipalities and water districts.

As the district court concluded, the potential conflicts that petitioners identify are irrelevant to the issues before the district court in this case, and they furnish no basis for intervention.[4] At least at present, this case involves primarily the validity of the salinity standards promulgated by the states and approved by the Administrator of EPA.[5] Petitioners, like the states, urge that the regulations are valid. Accordingly, as the district court observed (Pet. App. 10a), "the interests advanced by these proposed intervenors in upholding the validity of these previously promulgated regulations would appear to be identical with those interests advanced by the states." Since petitioners, like the City of Philadelphia in *New York* v. *New Jersey, supra,* 345 U.S. at 374, "have been unable to point out a single concrete consideration" with respect to which the states' position in the current litigation does not represent the proposed intervenors'

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[4]Petitioners also emphasize (78-658 Pet. 15; 78-678 Pet. 11) that their states support their claim to intervention. See 78-658 Pet. App. 23a-25a; 78-678 Pet. App. 23a-24a. But the states, like petitioners, have suggested no way in which their interests diverge from those of petitioners with respect to this litigation, and the states' agreement that petitioners should be permitted to represent their own interests does not establish petitioners' right to intervene. Indeed, as the court of appeals noted (Pet. App. 22a n.3), it is not surprising that the states welcome the addition of a number of parties who share the states' views.

[5]EDF also seeks to compel the federal respondents to search for alternative ways to deal with the salinity problem, to identify point sources where salinity standards are not met, to establish maximum load levels, to monitor the state planning processes, and to implement water quality standards promulgated by the states (Pet. App. 1a-2a). The federal respondents, the states, and petitioners oppose these claims as well as the primary attack on the salinity standards.

interests, the district court correctly denied intervention.[6] Of course, if the interests of the parties subsequently diverge, the district court may order intervention. See Pet. App. 22a n.3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1978

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[6] *Trbovich* v. *United Mine Workers, supra,* is not to the contrary. In *Trbovich* the Court concluded that Title IV of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 481 *et seq.*, created private rights in favor of individual union members, as well as a public interest in free union elections. Since these two interests "may not always dictate precisely the same approach to the conduct of the litigation," the Court concluded that the individual union member may intervene in an action brought by the Secretary to enforce both the public and private interests. 404 U.S. at 539. Here, petitioners are not seeking to enforce a statutorily created right. They simply seek to join the states in opposing EDF's claims.

DOJ-1978-12

No. 78-658

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UTAH POWER & LIGHT COMPANY, *Petitioner*

v.

ENVIRONMENTAL DEFENSE FUND, INC.,
DOUGLAS M. COSTLE, *Et Al*, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Both the federal respondents and respondent Environmental Defense Fund (EDF) attempt to characterize the Court of Appeals' decision in this case as a routine application of an established legal principle. Fed. Def. Br. at 4-6; EDF Br. at 15-17. Both parties also deny the existence of any conflicts between the interests of Utah Power and the interest of the states which are allegedly representing Utah Power in this litigation. Fed. Def. Br. at 6-8; EDF Br at 20-21. These characterizations and denials, however, do not

accurately assess either the law or the facts relevant to this case. The issue raised by Utah Power in its petition thus remains deserving of review by this Court.

I.

Respondents claim that the standard which this Court formulated in *New Jersey* v. *New York,* 345 U.S. 369 (1953), an original jurisdiction action, governs all adequacy of representation questions when the federal government or a state is a party to litigation. Fed. Def. Br. at 5-6; EDF Br. at 15-17. Under this standard, "an intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state", 345 U.S. at 373. The federal respondents contend that this principle is "well settled", even in non-original jurisdiction actions, Fed. Def. Br. at 5, and EDF describes it as a "working rule . . . familiar . . . in a variety of descriptive terms and contexts." EDF Br. at 16. However, application of the *New Jersey* standard in non-original jurisdiction actions is far from universal, and it is this Court's interpretation of Rule 24(a) of the Federal Rules of Civil Procedure in *Trbovich* v. *United Mine Workers,* 404 U.S. 528 (1972) which is the "well-settled" interpretation which has been adopted by the Court of Appeals for the District of Columbia Circuit.

This Court held in *Trbovich* that an individual union member was not adequately represented by the Secretary of Labor even though the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 481, *et seq.* made the Secretary, in effect, "the union member's lawyer." 404 U.S. at 539. The *Trbovich* Court's failure to even mention the *New Jersey* rule certainly

casts doubt on the federal respondents' contention that the *New Jersey* rule is applicable even where the federal government is a party to the litigation, Fed. Def. Br. at 5.

In *United States* v. *Nevada and California,* 412 U.S. 534 (1973) this Court discussed the scope of the *New Jersey* standard and clearly limited it to suits invoking the Court's original jurisdiction. 412 U.S. at 538.[1] Despite its clear relevance to the issue presented here, the federal respondents completely ignore *United United* v. *Nevada.*[2]

When presented with claims that a governmental entity adequately represents a prospective intervenor's interest, the lower federal courts frequently apply the *Trbovich* rather than the *New Jersey* standard. In *National Farm Lines, Inc.* v. *Interstate Commerce Commission,* 564 F.2d 381 (10th Cir. 1977), National Farm Lines sought a declaration that § 203(b)(5) of the Interstate Commerce Act, 12 U.S.C. § 114j, and certain regulations promulgated thereunder were un-

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[1] The Court unambiguously stated that "the individual users of water . . . ordinarily would have no right to intervene in an original action in this Court", citing *New Jersey* as sole authority for that proposition. The Court then immediately added that these same water users "would have an opportunity to participate in their own behalf if this litigation goes forward in the District Court". 412 U.S. at 538.

[2] Respondent EDF attempts to draw a distinction between the Court's use of the phrases "opportunity to participate" and "right to intervene", arguing that the former does not necessarily include the latter. EDF Br. at 17-18. Even assuming the validity of that distinction, it is nonetheless clear that the Court expressly applied the *New Jersey* standard in determining the appropriateness of intervention in the original jurisdiction action but made no suggestion that it would apply in the District Court proceedings.

constitutional. The statutory and regulatory scheme was designed to protect the regulated motor common carrier industry from unregulated competition. In reversing the district court's denial of intervention to several regulated common carriers, the Court of Appeals for the 10th Circuit ruled that even though the issue was purely one of the legality of statutes and regulations, the I.C.C. would be unable to represent the economic interests of the regulated motor carriers. The Court of Appeals never mentioned the *New Jersey* standard despite the Interstate Commerce Commission's presence in the litigation. The court's opinion reflects instead this Court's reasoning in *Trbovich.*

> We have here also the familiar situation in which the governmental agency is seeking to protect not only the interest of the public but also the private interest of the petitioners in intervention, a task which is on its face impossible. The cases correctly hold that this kind of a conflict satisfies the minimal burden of showing inadequacy of representation.

564 F.2d at 384.

Other cases have also recognized the inadequacy of governmental representation of the interests of private parties without even mentioning *New Jersey.* In *Natural Resources Defense Council, Inc.* v. *Costle,* 561 F.2d 904 (D.C. Cir. 1977), various environmental groups brought an action against the Administrator of the Environmental Protection Agency seeking declaratory and injunctive relief against EPA with respect to its duties under Section 307(a) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1317(a). The Court of Appeals for the District of Columbia Circuit ruled that the district court

had erred in denying intervention to various rubber and chemical companies who were directly affected by the regulations. The Court of Appeals held that intervention was warranted under *Trbovich* despite the district court's insistence that EPA could adequately represent the private parties' interests. The court ignored *New Jersey* and applied *Trbovich* in spite of the federal government's participation in the suit. *See also Atlantic Refining Company* v. *Standard Oil Co.,* 304 F.2d 387 (D.C. Cir. 1962).[3]

Other instances of courts holding that the government may not adequately represent private interests in cases challenging the validity of statutes, regulations, or ordinances include: *Planned Parenthood of Minnesota, Inc.* v. *Citizens For Community Action,* 558 F.2d 861 (8th Cir. 1977); *Joseph Sillken and Co.* v. *City of Toledo,* 528 F.2d 867 (6th Cir. 1975), *vacated on other grounds,* 429 U.S. 1068 (1977); *General Motors Corp.* v. *Burns,* 50 F.R.D. 401 (D. Hawaii, 1970); *Holmes* v. *Government of Virgin Islands,* 61 F.R.D. 3 (D. St. Croix 1973); *Nader* v. *Ray,* 363 F. Supp. 946 (D.D.C. 1973). In each case the person or

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[3] In *NRDC* v. *Berklund,* No. 75-0313 (June 30, 1978 D.D.C.) *appeals docketed* Nos. 78-1757, 78-1787, 78-1842 (D.C. Cir. 1978). Utah Power, a public utility was permitted to intervene in an action brought by private environmental organizations contesting the validity of the Interior Department's interpretation of § 201(b) of The Mineral Leasing Act of 1920, 30 U.S.C. §§ 181 *et seq.* in spite of the fact that it was only one of 182 lease applicants. Even though the issue was purely a question of statutory construction and the litigation would affect Utah Power's lease applications only in subsequent administrative proceedings, a situation much like the instant case, the District Court permitted intervention without applying the *New Jersey* rule. *See also NRDC* v. *Hughes,* 437 F. Supp. 981, (D.D.C. 1977) *appeal docketed* No. 78-1656 (D.C. Cir. 1978).

group was allowed to intervene without satisfying the *New Jersey* standard.

It is thus obvious that the federal respondents' "well settled" *New Jersey* standard is anything but "well settled" in non-original jurisdiction actions.[4]

II.

Both the federal respondents and EDF attack Utah Power's claim that its interests are not adequately represented by existing parties in this litigation.[5] Both

[4] The cases relied on by the federal respondents fall far short of sustaining their contention that the *New Jersey* standard is "well settled". *United States* v. *Associated Milk Producers, Inc.*, 534 F.2d 113 (8th Cir.), *cert. den.* 429 U.S. 940 (1976), *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961) and *Illinois* v. *Bristol-Myers Co.*, 470 F.2d 1276 (D.C. Cir. 1972) all were instances where the federal government or state government brought an anti-trust action. Since the prospective intervenors could always bring their own treble damage suits to vindicate their private interests, 366 U.S. at 690, the courts' failure to allow them to intervene in an enforcement action designed to protect the public interest was not surprising.

Both *Commonwealth of Pennsylvania* v. *Rizzo*, 530 F.2d 501 (3d Cir.), *cert. den.*, 426 U.S. 921 (1976), and *Leech Lake Area Citizens Committee* v. *Leech Lake Band of Chippewa Indians*, 486 F.2d 888 (8th Cir. 1973) were intervention cases concerned more with timeliness issues than with questions of adequacy of representation. In *Leech Lake*, the prospective intervenors moved to intervene only after the case had gone to trial, a judgment rendered, appeals taken, and the case remanded to the district court. In *Rizzo*, the prospective intervenor moved to intervene over eleven months after the case commenced and several days after the court had issued an injunction *pendente lite*.

[5] The federal respondents' misperception of Utah Power's position is evident in their statement that "[p]etitioners also contend that they have demonstrated such compelling interests in their own right . . ." Fed. Def. Br. at 6. Utah Power has never attempted

parties base their arguments on Utah Power's shared interest with the federal defendants and the states in defending the validity of the current regulations. This similarity in interest, they argue, enables the existing parties to this litigation to adequately represent Utah Power's interest, despite the state's express disclaimer of such an ability.[6] Fed. Def. Br. at 7 n.4; EDF Br. at 21-22. However, this case does not involve only the issue of the validity of the states' standards. The federal respondents have recognized that EDF has asked for relief other than a declaration of the invalidity of the standards. *See* Fed. Def. Br. at 7, n.5. Thus, the opposing parties' "unity of interest" argument is inappropriate. But even if the validity of the standards was the sole issue in this case, Utah Power would be inadequately represented by these parties.

The fact that a prospective intervenor urges a resolution of the litigation which is identical to that ad-

to show that its interest, which satisfies Rule 24(a), meets *New Jersey's* stricter standard for judging adequacy of representation. Utah Power demonstrated its interest in this litigation and neither the district court nor the Court of Appeals found that interest inadequate to satisfy the interest requirements of Rule 24(a). The Court of Appeals erroneously forced Utah Power to satisfy *New Jersey's* "compelling interest" standard in order to demonstrate inadequacy of representation when all that Utah Power was required to show under *Trbovich* was that representation of its interests by existing parties "may be" inadequate—a "minimal burden". Utah Power amply met that test. Utah Pet. at 16-18.

[6] Contrary to the respondents' contentions, Fed. Def. Br. at 7, n.4, EDF Br. at 22, courts have often given significant weight to statements by existing parties that they would be unable to adequately represent a prospective intervenor's interest. *See, New York P.I.R.G.* v. *Regents of the University of the State of New York*, 516 F.2d 350, 352 (2d Cir. 1975); *General Motors Corp.* v. *Burns*, 50 F.R.D. 401 (D. Hawaii, 1970).

vanced by existing parties is insufficient by itself to establish adequacy of representation when the prospective intervenor possesses substantial economic interests in the litigation. *See Trbovich, supra; National Farm Lines* v. *I.C.C., supra; New York P.I.R.G.* v. *Regents of University of State of New York,* 516 F.2d 350 (2d Cir. 1975); *Holmes* v. *Government of Virgin Islands, supra; Natural Resources Defense Council, Inc.* v. *United States Nuclear Regulatory Commission,* 578 F.2d 1341 (10th Cir. 1978). In this case, Utah Power possesses a substantial economic interest in the litigation. The district court found that Utah Power "has an interest in this matter", App. A, Utah Pet. p. 11a, and "[t]here is a possibility that if this court invalidates these regulations the ensuing rulemaking may result in a curtailment of Utah Power's water use and storage rights." App. A, Utah Pet. p. 12a. Since these water use and storage rights are the cornerstone of the company's economic survival, Utah Power can be expected to make a more vigorous presentation of the economic side of the argument than would the existing defendants.[7] *See N.Y.P.I.R.G., supra* at 352.

Although Utah Power and the current defendants have a similar interest in sustaining the states' plans and regulations, these interests are not identical. The states, as the sovereign entities drafting these standards, and the federal defendants, as the officials approving these standards, possess interests which do not include the proprietary-economic interests of Utah

[7] It is this substantial economic interest in maintaining its water use and storage rights which sets Utah Power apart from the "millions of citizens" who are interested in controlling salinity pollution in the Basin and with whom EDF would lump Utah Power. EDF Br. at 8.

Power. The states and the federal government have an obvious sovereign interest in seeing their regulations and actions judicially affirmed.

> But it is not impossible to imagine that, as the litigation develops, the Government might conclude that a new statute passed under unquestionable circumstances might better serve their interest. Or they might conclude that change in the original plans was warranted and, therefore, the statute need not be vigorously defended.

Holmes v. *Gov't of Virgin Islands, supra* at 5. *See also NRDC* v. *Costle, supra.* Utah Power, on the other hand, has a large, immediate financial interest to protect. It cannot afford to have the carefully structured current system of salinity standards and implementation plans disturbed by a government determination that the regulations should be changed.

Thus, although Utah Power's interest in this litigation may not be one which is so distinct from that of the current defendants so as to qualify as a "compelling interest in its own right" under *New Jersey,* it is nonetheless clear that representation of that interest by existing parties "may be" inadequate under *Trbovich.*

III.

This Court should be aware of a recent decision which bears directly on the issue presented for review. In *Environmental Defense Fund, Inc.* v. *Higginson,* No. 78-1135 (D.D.C., filed June 21, 1978), EDF, along with several other groups, instituted an action requesting an order requiring the federal defendants to prepare a comprehensive environmental impact statement

analyzing existing and future water resource projects and operations in the Colorado River Basin.

Higginson was filed shortly before the Court of Appeals denied the intervention motions at issue here. Several Basin states—Arizona, Colorado, Nevada and Wyoming—moved to intervene. The state of Utah did not seek intervention. Utah Power also moved to intervene. The basis for Utah Power's intervention motion was again its rights to withdraw, use and store Colorado River water. Its interest was thus similar to its interest in the current litigation.

On November 3, 1978, the district court granted Utah Power's and all of the states' intervention motions.[8] The only reason given by the district court for allowing Utah Power to intervene was the fact that "the *parens patriae* doctrine does not apply to the Utah Power and Light Company . . . because it is not a citizen of any state that has moved to intervene in this suit. The company, therefore, is entitled to intervene as of right." App. A., p. 3a. It is evident from the district court's action that it found that Utah Power satisfied both the interest and the impairment requirements of Rule 24(a) in factual circumstances basically the same as were involved in this case. However, the Court found that the company also satisfied the inadequacy of representation test because the State of Utah had not moved to intervene. Thus, it appears that the district court and the Court of Appeals have formulated an intervention rule which depends on *when* the applicant for intervention files his motion. Assuming the applicant has an interest which could be impaired, he

[8] The Court's order is attached hereto as Appendix A.

will be allowed to participate if this motion is filed and granted before his parent state moves to intervene. However, if the state's motion precedes the applicant's, the state will be presumed to be representing the applicant's interests and intervention will be denied.

The Court of Appeals' contortion of this Court's *New Jersey* decision and its circumvention of this Court's *Trbovich* standard are the forces which produce this unusual result. Review of the Court of Appeals' action is thus essential to clarify and reestablish the proper standards to be applied in the interpretation of an important Federal Rule of Civil Procedure.

IV. CONCLUSION

For the foregoing reasons, as well as for the reasons stated in Utah Power's Petition, a writ of certiorari should be issued.

Respectively submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1135

Filed November 3, 1978
James F. Davey, Clerk

ENVIRONMENTAL DEFENSE FUND INC., ET AL., *Plaintiffs*,

v.

R. KEITH HIGGINSON, Commissioner, Bureau of Reclamation, Department of Interior, ET AL. *Defendants*.

MEMORANDUM AND ORDER

This matter comes before the court on motions to intervene filed by four states and several local entities. In this suit, the plaintiffs seek declaratory, injunctive, and mandatory relief pursuant to Section 102(c) of the National Environmental Policy Act ("NEPA") of 1969, 42 U.S.C. §§ 4321 *et seq.* The plaintiffs ask this court to order the federal defendants to prepare a comprehensive environmental impact statement ("EIS") analyzing existing and future water resource projects and operation in the Colorado River Basin ("Basin"). As part of their prayer for relief, the plaintiffs seek to enjoin the construction of nine planned federal water resource projects in the Basin pending completion of the comprehensive EIS.

Each of the movants seeks intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure or, in the alternative, permissive intervention under Rule 24(b). The first group of intervenors comprises four of the seven Basin states affected by the federal program of water resource development projects: Arizona, Colorado, Nevada, and Wyoming. The second group comprises four local Colorado water districts, one local Nevada water district, and one electrical utility company. The plaintiffs

do not oppose intervention by the states, although they suggest that it would be appropriate for the court to impose conditions on the participation of those states admitted as parties to this litigation. Intervention by the second group of entities, whether of right or permissive, is opposed by the plaintiffs. The federal defendants apparently do not oppose the intervention of either group of movants.

The four states of Arizona, Colorado, Nevada and Wyoming are entitled as of right to intervene in this action. The plaintiffs raise the concern, however, that, as parties, those states might adopt dilatory measures that could impede the prompt resolution of this suit. But, at this point in the litigation the plaintiffs' fears of duplicative discovery and dilatory motion practice are too conjectural to warrant the imposition of conditions upon the intervenors. If future actions by the intervening parties threaten to jeopardize the efficient conduct of the proceedings, the court will consider imposing appropriate conditions upon those parties.

The court will deny the motions filed by the Nevada entity and the Colorado entities to intervene as of right in this suit. As in *EDF* v. *Costle,* Civil Action No. 77-1436 (Mem. Op. April 20, 1978), *sum. aff'd* Appeals Nos. 78-1471, 78-1515, and 78-1566 (D.C. Cir. 1978), the intervening states of Colorado and Nevada will be able to speak for and represent the interests of the local groups who seek to become parties to this litigation. The fact that the interests of these groups may diverge from those of the federal defendants does not make out a case of inadequate representation under Rule 24(a)(2), because the court has ruled that Colorado and Nevada are entitled to intervene. None of the local Colorado water districts or the local Nevada water district has offered any compelling reason or circumstance, *see State of New Jersey* v. *State of New York,* 345 U.S. 369 (1953), in which they differ materially with the positions taken by those intervenors. Therefore, under the doctrine of *parens patriae* the interests of these five entities are adequately represented in the present suit.

The *parents patriae* doctrine does not apply to the Utah Power and Light Company, a utility company which supplies a large portion of the total electricity needs of Utah and Wyoming, because it is not a citizen of any state that has moved to intervene in this suit. The company, therefore, is entitled to intervene as of right.

The court in its discretion will deny the motion for permissive intervention under Rule 24(b) filed by the local Nevada water district and the local Colorado water districts. A review of the arguments the local groups propose to advance if they are admitted to this action indicates that they either are cumulative or would be unlikely to help this court resolve the question of the government's compliance with NEPA.

Therefore, upon consideration of the motions to intervene and the opposition thereto, it is, by the court, this 3rd day of November, 1978,

ORDERED that the motions of Arizona, Colorado, Nevada, Wyoming, and the Utah Power and Light Company to intervene as of right are granted; and it is further

ORDERED that the motions of the Colorado River Water Conservation District, Southwestern Water Conservation District, Dolores Water Conservancy District, Tri-County Water Conservancy District, and Las Vegas Valley Water District to intervene as of right or, in the alternative, for permissive intervention are denied.

/s/ THOMAS A. FLANNERY
Thomas A. Flannery

United States District Judge

Nos. 78-658 and 678

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-678

COLORADO RIVER WATER CONSERVATION DISTRICT; SOUTHWESTERN WATER CONSERVATION DISTRICT; NORTHERN COLORADO WATER CONSERVANCY DISTRICT; CITY OF COLORADO SPRINGS; CITY OF AURORA; BOARD OF WATER WORKS, CITY OF PUEBLO; AND THE CITY AND COUNTY OF DENVER, *Petitioners*

v.

ENVIRONMENTAL DEFENSE FUND., INC., *et al.*, *Respondents*

No. 78-658

UTAH POWER AND LIGHT CO., *Petitioner*

v.

ENVIRONMENTAL DEFENSE FUND., *et al.*, *Respondents*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY MEMORANDUM OF PETITIONERS COLORADO RIVER WATER CONSERVATION DISTRICT ET AL., TO THE BRIEFS IN OPPOSITION

[List of Counsel Inside Cover]

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OCTOBER TERM, 1978

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REPLY MEMORANDUM OF PETITIONERS COLORADO RIVER WATER CONSERVATION DISTRICT ET AL., TO THE BRIEFS IN OPPOSITION

The government's brief chooses to meet the Circuit's view that the petitioners be remitted to the "political processes" of the sovereign states in the defense of their interests rather than the federal courts by ignoring it. EDF relegates this proposition to a footnote (EDF Br. p. 20, n. 35) where it would have this Court believe that by its reference to the "internal mechanisms" and "political processes" of the sovereign states, the court below meant rulemaking on both the federal and state level. This incredulous suggestion of the "very significant point" the court was making obviously overreaches in an effort to mask the rather plain meaning that if the entities of the state having rights to protect do not appreciate the conduct of that defense that they seek a change in leadership at the state capital. This notion is not only inappropriate in the defense of a lawsuit but is of course unrealistic. The "political processes" require time far beyond the inexorable process of trial court proceedings. Neither ignoring this view, as the Government would do, nor explaining it away by fantasy, as EDF would do, faces up to the evident reality behind this view to begin with, namely that if "internal mechanisms" and "political processes" need to be invoked at all it is quite apparent that there may be inadequacy of representation of rights under attack in court. That is what this case is all about, and in those circumstances, this Court's holding in *Trbovich* v. *United Mine Workers,* 404 U.S. 528, 538 n. 10, should apply.

Several additional points should be made with regard to the briefs in opposition. Among them, the government and EDF misunderstand our argument when they suggest our contention is that the doctrine of *parens patriae* only applies in the original jurisdiction context (U.S. Br. p. 5, EDF Br. p. 15). Undeniably, the doctrine itself has broader application. *See Hawaii*

v. *Standard Oil,* 405 U.S. 251 (1972). The opinion below, however, was bottomed on the standards adopted by this Court in *New Jersey* v. *New York,* 345 U.S. 369 (1963), applying *parens patriae* to an intervention in an action involving "controversies between the states". We assert that it was not intended that those standards be extended to a lawsuit in district court where the appropriate limitations of the Supreme Court's rules on original jurisdiction were not intended to apply.

EDF and the federal respondents also suggest that the appropriate standard for intervention here is "compelling showing" or "special interest" without reconciling these standards with the "minimal burden" standard established by this Court in *Trbovich* (U.S. Br. p. 5, EDF Br. p. 20). Their reliance on *Pennsylvania* v. *Rizzo,* 530 F.2d 501 (3rd Cir.), *cert. denied sub nom., Fire Officers Union* v. *Pennsylvania,* 426 U.S. 921 (1976), is misplaced. The Third Circuit clearly stated that "the ultimate issue in this appeal is the timeliness of the intervention motion." *Id.* at 504. The precise holding therefore, was not on the issue of adequacy of representation, but on the timeliness of the motion to intervene, which the court held to be inexcusably late. *Id.* at 501. The other case authority cited by EDF and the federal respondents falls far short of supporting what they perceive to be a "rule" in lower federal courts.[1] To the contrary, the well-reasoned an-

[1] EDF cites *United States* v. *Nevada,* 412 U.S. 534 (1973) and *United States* v. *Crookshanks,* 411 F.Supp. 268 (D. Oregon 1977), both clearly distinguishable—*Nevada* involving the state's capacity to represent all her citizens in an interstate compact and *Crookshanks* involving the scope of a TRO as including fishermen of a state when that state was a party to the action—neither involves intervention. The two intervention cases cited are not controlling. *Stream Pollution Control Board* v. *United States Steel, Inc.,* 62

alyses in cases such as *United States* v. *Reserve Mining*, 56 F.R.D. 419-20 (D. Minn. 1972), *aff'd on other grounds*, 498 F.2d 1073 (8th Cir. 1973), and *General Motors* v. *Burns*, 50 F.R.D. 401, 404-06, (D. Hawaii 1970), make clear that *parens patriae* should not be invoked to preclude intervention by a party whose interests may be affected even though a governmental entity is already a party. This ruling has had wide application. *See, e.g., National Farm Lines* v. *ICC*, 564 F.2d 381 (10th Cir. 1977) (common carrier associations not adequately represented by federal govern-

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F.R.D. 31 (N.D. Ind. 1974), was decided on the ground that the applicant for intervention did not sufficiently allege an interest in the action. In *Illinois* v. *Bristol-Myers Co.*, 470 F.2d 1278 (D.C. Cir. 1972), the state declared itself to be acting as a representative of a class including its political subdivisions pursuant to F.R. of Civ. Proc. 23. Here the State of Colorado supports the intervention of petitioners and the action is not a class action. Furthermore, the court below acknowledged that the petitioners have an interest in the subject matter of the proceedings.

The government's case authority is also wide of the mark. *United States* v. *Associated Milk Producers, Inc.*, 534 F.2d 113 (8th Cir.), *cert. denied*, 429 U.S. 940 (1976) held a farmers' organization would not be permitted to intervene where it had already submitted voluminous information on a proposed settlement in antitrust litigation. That case is part of the specialized body of case law on antitrust consent decrees as is *Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961), where this Court specifically declined to "assess the wisdom of the Government's judgment in negotiating and accepting the 1960 consent decree." *Id.* at 689. Reliance on *Leech Lake Area Citizens Committee* v. *Leech Lake Band of Chippewa Indians*, 486 F.2d 888 (9th Cir. 1973), is also misplaced. There denial of previous efforts at intervention had become final and the court viewed the appeal of the latest attempt as frivolous. *Associated Industries* v. *Train*, 543 F.2d 1159 (1976), holding the State of Alabama was adequately represented by the federal government is limited to the peculiar facts of that case wherein Alabama failed to file a pleading setting forth its claims or defenses. *Id.* at 1161 n. 8.

ment); *New York P.I.R.G.* v. *Regents*, 516 F.2d 350 (2nd Cir. 1975) (pharmaceutical association not adequately represented by state agency); *Sierra Club* v. *Stamm*, 6 E.R.C. 1848 (D. Utah 1974), *aff'd on other grounds*, 507 F.2d 788 (10th Cir. 1974) (State of Utah and four water districts permitted to intervene in a suit threatening their beneficial use of water); *Sierra Club* v. *Froehlke*, 359 F.Supp. 1289 (S.D. Texas 1973) (agency of state and several municipalities of state granted intervention as of right); *Holmes* v. *Gov't of Virgin Islands*, 61 F.R.D. 3 (D. Virgin Is. 1973) (corporation not adequately represented by government of Virgin Islands); *Keith* v. *Volpe*, 352 F.Supp. 1324 (C.D. Cal. 1972), *aff'd on other grounds sub. nom Keith* v. *California Highway Commission*, 506 F.2d 696 (9th Cir. 1974) (municipalities granted intervention as of right where state agencies were already parties).

EDF also contends that a finding of adversity of interest is required before inadequate representation can be found (EDF Br. p.20). This is not the rule and the cases EDF cites do not suggest it is. EDF attempts to derive a negative inference from *New Mexico* v. *Aamodt*, 537 F.2d 1102 (10th Cir. 1976), *Peterson* v. *United States*, 41 F.R.D. 131 (D. Minn. 1966), and *Stadin* v. *Union Electric*, 309 F.2d (9th Cir. 1962). Because the courts in these cases found representation inadequate due to the adversity of interests between the intervenors and their proposed "representatives", EDF concludes that adversity of interest is required. This is pure fallacy. Wright & Miller, *Federal Practice and Procedure*, § 1909 at 523-24 (1972). See *Ford Motor Co.* v. *Bisanz Bros., Inc.*, 249 F.2d 22 (8th Cir. 1951).

Moreover, EDF's reliance (EDF Br. p. 20) on *Nuesse* v. *Camp,* 385 F.2d 694 (D.C.Cir. 1967), on this issue is particularly surprising since *Nuesse* specifically stated that "little guidance" could be obtained by reference to *Stadin, supra. Nuesse* v. *Camp,* 385 F.2d at 702-03. The court in *Nuesse* pointed out that the change wrought by the 1966 amendments to Rule 24 "underscores both the burden on those opposing intervention to show the adequacy of existing representation and the need for a liberal application in favor of intervention." *Id.* at 702. On the issue for which EDF cites *Nuesse,* the court ruled that "interests need not be wholly 'adverse' before there is a basis for concluding that existing representation of a 'different' interest may be inadequate." *Id.* at 703.

The government's brief at last appears to acknowledge that this lawsuit may be expected to spread well beyond the simple question of whether EPA's approval of the state salinity control standards was unlawful under the Federal Water Pollution Control Act Amendments of 1972. In noting that this is "primarily" the issue "at least at present" the government very properly qualifies the situation to sketch some of the factual problems and issues which are involved, the impact of which on the water supply responsibilities of the Districts and Cities, apart from the general responsibilities of the State, are plainly evident.[2] Yet it

[2] See U.S. Br. p. 7, n. 5. This cautious characterization by the government is certainly required as a consequence of an order of September 1, 1978 in the district court denying all of the U.S. and state motions for judgment on the pleadings, directed at these very issues. The court indicated that some of the determinations to be made "will require the court to immerse itself in a great deal of highly technical data" and that the "appropriate evidentiary review is broad" even though grounds on which a court may reverse EPA are quite narrow (Order, p. 4).

was the simple question of federal law approach which both EDF and the government urged as making the participation of the Districts and Cities unnecessary because their interests were alleged to be identical with the States. This simplistic yet erroneous view prevailed below, with *parens patriae* as protective cover (Pet. App. 3a, 14a-16a). It is at least clear from the government's brief, contrary to EDF's insistence that state representation is adequate, that large matters having impact on local entities are at stake in which local views may well be different and which they, not the state, should be expected and entitled to protect.

Finally, the continuing harm of the result below is amply demonstated by the district court's memorandum and order of November 3, 1978 in *Environmental Defense Fund, Trout Unlimited and the Wilderness Society* v. *Higginson, Com'r., U.S. Bureau of Reclamation, et al,* D.D.C. Civil Action No. 78-1135 (Appendix A hereto), which among other things denied intervention to several Colorado water districts, including two of the petitioners here, in a suit aimed at stopping immediately construction on nine federally authorized water projects in the Colorado River Basin located in Arizona, Colorado, Nevada, Utah and Wyoming. This denial of intervention to clearly impacted local entities, coming hard on the heels of the action below and relying on it, indicates the urgency of action now by this Court. There should be no doubt as to entitlement to full participation in court, not only by states but by affected entities within them, in the face of efforts, here in a court far removed from the place of use, to stop the further development of an essential natural resource.

It is respectfully urged that the decision of the court of appeals denying petitioners' motion to intervene be reviewed and reversed.

Respectfully submitted,

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Dated December 28, 1978

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1135

ENVIRONMENTAL DEFENSE FUND INC., ET AL., *Plaintiffs*,

v.

R. KEITH HIGGINSON, Commissioner, Bureau of Reclamation, Department of Interior, ET AL., *Defendants*.

Memorandum and Order

(filed November 3, 1978)

This matter comes before the court on motions to intervene filed by four states and several local entities. In this suit, the plaintiffs seek declaratory, injunctive, and mandatory relief pursuent to Section 102(c) of the National Environmental Policy Act ("NEPA") of 1969, 42 U.S.C. §§ 4321 *et seq.* The plaintiffs ask this court to order the federal defendants to prepare a comprehensive environmental impact statement ("EIS") analyzing existing and future water resource projects and operations in the Colorado River Basin ("Basin"). As part of their prayer for relief, the plaintiffs seek to enjoin the construction of nine planned federal water resource projects in the Basin pending completion of the comprehensive EIS.

Each of the movants seeks intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure or, in the alternative, permissive intervention under Rule 24(b). The first group of intervenors comprises four of the seven Basin states affected by the federal program of water resource development projects: Arizona, Colorado, Nevada, and Wyoming. The second group comprises four local Colo-

rado water districts, one local Nevada water district, and one electrical utility company. The plaintiffs do not oppose intervention by the states, although they suggest that it would be appropriate for the court to impose conditions on the participation of those states admitted as parties to this litigation. Intervention by the second group of entities, whether of right or permissive, is opposed by the plaintiffs. The federal defendants apparently do not oppose the intervention of either group of movants.

The four states of Arizona, Colorado, Nevada and Wyoming are entitled as of right to intervene in this action. The plaintiffs raise the concern, however, that, as parties, those states might adopt dilatory measures that could impede the prompt resolution of this suit. But, at this point in the litigation the plaintiffs' fears of duplicative discovery and dilatory motion practice are too conjectural to warrant the imposition of conditions upon the intervenors. If future actions by the intervening parties threaten to jeopardize the efficient conduct of the proceedings, the court will consider imposing appropriate conditions upon those parties.

The court will deny the motions filed by the Nevada entity and the Colorado entities to intervene as of right in this suit. As in *EDF* v. *Costle,* Civil Action No. 77-1436 (Mem. Op. April 20, 1978), *sum. aff'd* Appeals Nos. 78-1471, 78-1515, and 78-1566 (D.C. Cir. 1978), the intervening states of Colorado and Nevada will be able to speak for and represent the interests of the local groups who seek to become parties to this litigation. The fact that the interests of these groups may diverge from those of the federal defendants does not make out a case of inadequate representation under Rule 24(a)(2), because the court has ruled that Colorado and Nevada are entitled to intervene. None of the local Colorado water districts or the local Nevada water district has offered any compelling reason or circumstance, *see State of New Jersey* v. *State of New York,* 345 U.S. 369 (1953), in which they differ materially with

the positions taken by those intervenors. Therefore, under the doctrine of *parens patriae* the interests of these five entities are adequately represented in the present suit.

The *parens patriae* doctrine does not apply to the Utah Power and Light Company, a utility company which supplies a large portion of the total electricity needs of Utah and Wyoming, because it is not a citizen of any state that has moved to intervene in this suit. The company, therefore, is entitled to intervene as of right.

The court in its discretion will deny the motion for permissive intervention under Rule 24(b) filed by the local Nevada water district and the local Colorado water districts. A review of the arguments the local groups propose to advance if they are admitted to this action indicates that they either are cumulative or would be unlikely to help this court resolve the question of the government's compliance with NEPA.

Therefore, upon consideration of the motions to intervene, and the opposition thereto, it is, by the court, this 3rd day of November, 1978.

ORDERED that the motions of Arizona, Colorado, Nevada, Wyoming, and the Utah Power and Light Company to intervene as of right are granted; and it is further

ORDERED that the motions of the Colorado River Water Conservation District, Southwestern Water Conservation District, Dolores Water Conservancy District, Tri-County Water Conservancy District, and Las Vegas Valley Water District to intervene as of right or, in the alternative, for permissive intervention are denied.

/s/ THOMAS A. FLANNERY

United States District Judge